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VERSLAE

VAN DIE

NATURELLE-APPÈLHOWE

1960 (I)

REPORTS

OF THE

NATIVE APPEAL COURTS

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OFFICERS OF THE NATIVE APPEAL COURTS, 1961.

SENTRALE NATURELLE-APPÈLHOWE.
CENTRAL NATIVE APPEAL COURT.

PERMANENT MEMBER/PERMANENTE LID: N. P. J. O'CONNELL.
PRESIDENT: J. P. COWAN.

NOORDOOSTELIKE NATURELLE-APPÈLHOF.
NORTH-EASTERN NATIVE APPEAL COURT.

PERMANENT MEMBER/PERMANENTE LID: V. S. S. KING.
PRESIDENT: T. D. RAMSAY.

SUIDELIKE NATURELLE-APPÈLHOF.
SOUTHERN NATIVE APPEAL COURT.

PERMANENT MEMBER/PERMANENTE LID: E. J. H. YATES.
PRESIDENT: H. BALK.

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NORTH-EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 47/59.

BULUNGA *v.* **BULUNGA.**

PIETERMARITZBURG: 12th January, 1960. Before Ramsay, President, King and Botha, Members of the Court.

PRACTICE AND PROCEDURE.

Slovenly record—uncertain who is defendant—judgment against woman for return of lobolo—assistance by Court to unrepresented Natives.

Summary: A woman was sued assisted by her guardian. The particulars of claim state both parties are Natives and refer to First Defendant. Judgment was given for Plaintiff for return of lobola, purporting to be against the woman and her guardian as Defendants. As only the woman was cited, the judgment affects her only.

Held: A woman cannot be ordered to return the lobola paid for her on dissolution of the customary union.

Held: That judicial officers who hear actions in which unrepresented Natives appear should guide the litigants in matters of procedure.

Ramsay (President):

The record of the case discloses a sorry state of affairs. The summons, on its face cites Shawindile Dhlodhlo duly assisted by Ngushane Dlodlo, but on its reverse has the following contradictory allegation:—

1. *Both* parties are Natives.

2. Five years ago *Plaintiff and First Defendant* . . .

Thereafter, on the reverse of the summons, further reference is made to the First Defendant, also, in Paragraph 3 of the prayer, to Second Defendant. There is no Second Defendant as only Shawudile has been sued.

This is supported by the note on Page 1 of the record where the Native Commissioner wrote "On 6th August, 1959, Plaintiff and Defendant appear, Defendant duly assisted by her guardian". In Plaintiff's evidence he states "I paid 13 head of cattle to Defendant's father that is Defendant No. 2 in this case". Again I repeat—no Second Defendant has been sued. Also there is no plea by a second defendant nor any sign that a second defendant took part in the action. The notice of appeal is on behalf of only one Defendant.

The Native Commissioner's reasons for judgment state that "in this matter, brought under the Native Law, the Plaintiff sued the Defendant (be it noted the singular is used) for . . . C return of the lobola paid". There is no Native Law which sanctions a woman being sued for the return of lobola.

Sections 87 (3), 83 (*a*) and 88 of the Natal Code of Native Law have not been complied with.

There is nothing on record to show that Ngushane Dlodlo is Defendant's guardian or otherwise entitled to assist her in Court and no evidence has been taken of the sex and age of the child.

The appeal is allowed with costs and the Native Commissioner's judgment is altered to "Summons dismissed with costs". In this matter both parties were unrepresented in the Court below and it was accordingly the duty of the Native Commissioner to assist them in matters of procedure. His failure to do so, resulting in the present position, has involved them in unnecessary costs as it will be necessary for Plaintiff to institute action afresh.

For Appellant: Adv. A. Pitman, instructed by G. D. Havemann & Co.

For Respondent: No appearance.

NORTH-EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 63/59.

DHLAMINI *v.* DHLAMINI.

PIETERMARITZBURG: 15th January, 1960. Before Ramsay, President, King and Botha, Members of the Court.

JURISDICTION.

Status of Syndicate—whether a Native as defined by Act No. 38 *of* 1927*—proof of conditions of lease.*

Summary: Plaintiff, styling himself as trustee of the Rosboom Syndicate No. 1, which owns a building on a farm, leased the building to the Education Authorities for use as a school. The school committee hired out the building for entertainment purposes. The money so received being used for school purposes. Plaintiff now claims those moneys, alleging that the building was leased only during school hours. He failed in his claim and Plaintiff now appeals.

Held: That there is nothing to indicate that the Rosboom Syndicate No. 1 is a Native as defined by Act No. 38 of 1927.

Held: That the best proof of the conditions of a lease is the agreement of lease itself.

Cases referred to:

Khumalo *v.* Insulezibensi, U.S.N. Co., 1954, N.A.C. 70.

Appeal from the Court of Native Commissioner, Ladysmith.

Ramsay (President):

In this matter the Plaintiff in his claim alleges:—

1. Plaintiff is the Trustee of Rosboom Syndicate No. 1, which is the owner of the Ekuphumuleni School Building.
2. Defendant is the Chairman of the Ekuphumuleni School Board, and in his capacity as such, has charge of the school building during school hours.
3. During the period August, 1957, to October, 1958, Defendant has collected the sum of £28. 5s. being as and for hire of the school buildings to various organisations for the purpose of staging concerts, plays and the like.
4. The said concerts and plays were performed after school hours at which times Defendant had no lawful control over the school buildings.

5. The Rosboom Syndicate No. 1, is lawfully entitled to receive the said sum of £28. 5s. but in spite of demand made by Plaintiff through his Attorneys, Defendant neglects and/or fails to pay Plaintiff the said sum of money.
6. The parties hereto are Natives as defined by Act No. 38 of 1927.

In regard to paragraph 6 above, there is no evidence to prove the truth of the statement and the allegation is not self-evident as it would be were the litigants individual Natives.

Plaintiff was obviously seen by the Native Commissioner to be a Native but he is suing in his capacity as trustee of Rosboom Syndicate No. 1. There is nothing on record to show that Rosboom Syndicate No. 1 is a "Native" and so within the jurisdiction of the court below. This matter of jurisdiction is one that must be raised by this Court *mero motu*. For instance, if a Native Commissioner, from the appearance of a litigant in his court, is in doubt whether that litigant is a Native, he must first of all require that litigant, or the Native suing him, to prove that he is a Native, and by so doing the Native Commissioner must verify whether he has jurisdiction or not. See also Khumalo *v.* Insulezibensi Ubopumuze Swartkop Native Company, 1954, N.A.C. 70, wherein it was held that a Native limited liability company is not a "Native".

Plaintiff does not in any way show that he is entitled to sue on behalf of the Rosboom Syndicate No. 1 as he produced no constitution of that body.

Plaintiff sued Defendant in the latter's personal capacity although in paragraph 2 of his particulars of claim he states Defendant is "Chairman of the Ekuphumuleni School Board and in his capacity as such has charge of the school buildings during school hours". In his evidence Plaintiff stated "Defendant is being sued as chairman of the school committee" a body quite distinct from the school board.

The summons is directed however to "Philemon Dhlamini, c/o Ekuphumleni School", no mention of any capacity being made.

At the beginning of his evidence Plaintiff stated "I have leased these buildings to the Government" and then proceeds to state that the conditions of lease are contained in an interim procedural circular, issued by the Department of Bantu Education dated four years previously. If the building was leased why was the agreement of lease covering the period August, 1957, to October, 1958, in respect of which the claim is made, not produced? In a claim based on a lease the lease must be proved and the best way of proving it is to produce the agreement of lease. The circular produced is a set of directions to Education officials issued to guide them in their dealings with owners of buildings taken over for school purposes until such time as certain negotiations shall have been completed when, presumably, formal leases would be completed. It primarily refers to church buildings used as schools. In any case the provisions of the circular could not vary or in any way interfere with the provisions of the lease, stated by Plaintiff to be in existence.

School Inspector Ries, called by the Native Commissioner, states that the circular in question was superseded in 1957 by regulations, but even regulations cannot alter an existing lease although they may prescribe the conditions of a future lease. Incidentally the Inspector's reference to a Red Book "form 3 and subsequent forms on page 90" are meaningless to this Court as it is not known to what he refers, no "red book" having been put in during the trial.

The appeal is allowed and in view of the doubt in regard to jurisdiction, the judgment of the Court below is altered to "Summons dismissed with costs".

For Appellant: Adv. A. Pitman, instructed by Christopher, Walton & Tantham.

For Respondent: In person.

NORTH-EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 65/59.

SITEBE *v.* TOMO.

PIETERMARITZBURG: 12th January, 1960. Before Ramsay, President, King and Botha, Members of the Court.

PRACTICE AND PROCEDURE.

Rule 74 (3). *Native Commissioner's Court Rules: Failure to comply with.*

Summary: On application for rescission of a default judgment, applicant failed to deposit with the clerk of Court the costs incurred plus the sum of £2 as required by Rule 74 (3). The application for rescission was heard and rescission granted. Plaintiff applied to the Native Appeal Court for review on the grounds of gross irregularity by the Native Commissioner, which grounds, however, are irrelevant and do not deal with the present point.

Held: That Rule 74 (3) is imperative and that any proceedings subsequent to the default judgment are nul and void.

Application for Review of Proceedings held in the Court of Native Commissioner, Dannhauser.

Ramsay (President):

In this very confused matter it appears that Plaintiff obtained a default judgment against Defendant. The latter applied for rescission of this judgment, but the terms of Rule 74 (3) of the Rules for Native Commissioner's Courts were not complied with in that the costs of the action plus £2 were not deposited prior to the Clerk of Court setting down the application for rescission of judgment.

The Native Commissioner and the Plaintiff at that hearing presumed that the deposit had been made, the Plaintiff raised no objection and rescission of the default judgment was granted.

Subsequently Plaintiff discovered the omission and made application to the Court for an order compelling Defendant to make the deposit of costs and £2. He failed in this and took the matter to this Court which declined to interfere with the Native Commissioner's refusal to make the order.

Plaintiff now sued Defendant for the costs of default judgment plus subsequent costs incurred in issuing a warrant of execution. He again failed in the Court below and has brought the present case to this Court on review on the grounds of irregularity.

Plaintiff, represented by his own son in terms of Rule 27 (2), failed to show this Court that there was any irregularity in the present proceedings which should actually have been brought before it by way of appeal if he was not satisfied with the Native Commisisoner's decision.

The Defendant was in default at the hearing in this Court.

However, a gross irregularity has been committed in the proceedings prior to the present case by the breach of Rule 74 (3) by the Clerk of the Court. The rule is imperative.

This Court, accordingly, and under the powers vested in it by Section 15 of Act No. 38 of 1927, hereby declares the rescission of the original default judgment to be nul and void and of no effect.

The result is that the default judgment still stands.

In order, however, to enable the Defendant to meet the altered circumstances occasioned by this order, Rule 74 shall apply to him as if this order were a default judgment. In other words, he is given a period of a month from the date on which this order is brought to his notice, to proceed afresh for the rescission of the default judgment.

For Appellant: Levi Sitebe.

For Respondent: No appearance.

NORTH-EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 73/59.

CAMANE *v.* CAMANE.

PIETERMARITZBURG: 14th January, 1960. Before Ramsay, President; King and Botha, Members of the Court.

EMANCIPATION OF FEMALES.

Natal Code of Native Law—Grounds of emancipation.

Summary: Respondent, a Native widow, applied for emancipation in terms of section 28 (1) of the Natal Code of Native Law, alleging non-support by her guardian. Emancipation was granted by the Native Commissioner and against this decision the guardian appeals.

Held: The Native Commissioner's decision was erroneous because no grounds for emancipation as required by section 28 (1) of the Code were proved.

Appeal from the Court of the Native Commissioner, Mapumulu.

Ramsay (President):

Section 28 (1) of the Code lays down that a spinster, widow or divorcee may be emancipated for the reasons (1) that she owns immovable property, (2) that she is of good character, education and thrifty habits and (3) for any other good and sufficient reason.

In this matter, no grounds for granting emancipation for reasons (1) and (2) have been disclosed. Plaintiff is not the owner of immovable property and no evidence has been adduced to show that she is entitled to emancipation by virtue of good character, education and thrifty habits.

Reason (3) may include mismanagement by the guardian, disposal by him of estate property or undue interference by him in the affairs of the Applicant. None of this has been proved—his only offence, according to Applicant, is that he has not supported her and her family.

Applicant's deceased husband left her fairly well off and she has been utilizing the property for the support and education of her children without interference by Ben. There is no evidence that he has caused the family distress or hardship through non-support. On the contrary it seems that Applicant managed very well to provide for herself and her children. It is therefore found that no good and sufficient reason for the award of emancipation has been shown.

Applicant is inconsistent in that she cites Ben Camane in the Court below as Respondent, who according to Section 28 (1) of the Code must be her father or guardian, yet in her evidence she states Ambrose Camane, younger brother of Ben, is her guardian. Ambrose also states he is her guardian.

The question immediately arises—why did Applicant not cite Ambrose? However, it is very questionable whether Ambrose can be guardian, and as Ben has been cited, he is considered for purposes of this case, to be the guardian.

The appeal is allowed—the Native Commissioner's judgment is altered to read "Application dismissed". Costs in both courts to be borne by the estate.

For Appellant: Adv. A. Pitman instructed by Laurie C. Smith and King.

Respondent in person.

NORTH-EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 79/59.

ZULU *v.* NGUBANE.

PIETERMARITZBURG: 21st March, 1960. Before Ramsay, President, King and Towne, Members of the Court.

COSTS.

Costs allowed to Plaintiff though only partially successful.

Summary: Plaintiff sued Defendant on two claims, one for £112. 5s. 2d. and the other for 4 head of cattle or value £80. He obtained judgment on the first claim for £39 and on the second for 4 head of cattle or their value £60. The Native Commissioner ordered that each party pay his own costs as Plaintiff had failed in the major portion of his claim.

Held: That as Plaintiff's claim was neither exorbitant or excessive, he is entitled to costs.

Authority referred to:

"Law of Costs in South Africa", by Rubin and Stanford, page 73.

Appeal from the Court of the Native Commissioner, Harding.

Ramsay (President):

The Law on the point is set forth in Rubin and Stanfords "The Law of Costs in South Africa", page 73, wherein it is stated "The fact that a plaintiff claims more than he succeeds in recovering is not, in itself, a ground for refusing him costs. The rules of procedure enable a defendant, in these circumstances, to protect himself against the possibility that he will be required to pay unnecessary costs by tendering the amount due. To justify the Court in depriving a plaintiff of his costs the claim must be exeessive or exorbitant". Cases are quoted in support of this dictum.

Can it be said that Plaintiff's claims in this case are excessive or exorbitant? Claim No. 2 certainly was not as there was a consent to judgment although it was incomplete in that the alternative value of the cattle was not mentioned. In argument the Defendant's attorney remarked "Cattle cannot be tendered to Court". He has evidently overlooked the provisions of Rule 45 (6) (*b*) of the Rules of Native Commissioner's Courts.

Had he consented to judgment for 4 head of cattle *or their value* £60, the £60 could, in any case, have been paid into Court.

At the 1st July, 1959, hearing, before any evidence was led, Defendant consented to judgment for £27 on the second claim. On the conclusion of the case, when Defendant had heard Plaintiff's evidence, he consented to a further £12. It must be concluded that he did so as a direct result of information obtained from such evidence.

Plaintiff failed to prove a claim for £60, but can it be said that this claim is excessive or exorbitant? The circumstances are set forth in an affidavit by Plaintiff in which he states the £60 was paid to the Magistrate of Harding 40 years ago and that his receipt was destroyed when his hut burned down. Although he failed to prove this it may be true.

Had Defendant *in limine* consented to judgment for 4 head of cattle or their value £60 on the second claim and £39 on the first claim, it might well be that the suit would have been terminated without having to go to trial.

This Court can find no good reason for depriving Plaintiff of his costs.

The appeal is allowed with costs, and in the Native Commissioner's judgment, the words "Each party to pay its own costs" are deleted and the words "Defendant to pay costs" are substituted.

The Native Commissioner in his reasons for judgment referred to Plaintiff's briefing an attorney from a distant centre, thus adding to the costs. His attention is drawn to the case of Ngubane, 1952, N.A.C. 281, in which it was held that travelling expenses of a legal representative are covered by the composite fee prescribed for his appearance except in special circumstances. The practice is that such expenses are allowable only when there is no attorney available locally.

King and Towne, Members, concur.

For Appellant: Mr. N. J. Goosen for C. C. C. Raulstone & Co.

Respondent in default.

NORTH-EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 16/60.

MAMISI AND KHEI NGCOBO *v.* **MZONAKELE NGCOBO.**

PIETERMARITZBURG: 25th March, 1960. Before Ramsay, President, King and Towne, Members of the Court.

DAMAGES.

Case tried under Native Custom—Quantum of Damages—Contumelia.

Summary: In a chief's court damages were awarded. A ground of appeal is that damages were not proved and contumelia not pleaded.

Held: That contumelia as such has no place in Native Law and need not be pleaded or proved.

Only the relevant portion of the judgment has been reported.

The appeal was dismissed.

Ramsay (President).

In regard to the weight of evidence, the facts are admitted by the defence except that they deny that the field in question was under crops when Defendant Mamisi planted it with mealies. Plaintiff avers that he had planted Kaffir-corn and the Chief who tried the case states that before him Mamisi admitted destroying Plaintiff's crop. Defendant's own witness Mandhleni Ngcobo states that she assisted Mamisi to plant the field and that it had already been cultivated and the soil turned over. There may have been seed in the ground, but the point is immaterial whether growing crops were destroyed or not. The £5 damages awarded would not be excessive if no Kaffir-corn crop had been planted and was merely in respect of the wrongful use of Plaintiff's land by Mamisi which prevented Plaintiff's peaceful enjoyment of it.

Counsel for Respondents argued that damages had not been proved, no particulars having been given in respect of how the £5 damages awarded had been arrived at. Also that no damages for contumelia had been specially pleaded as required by Common Law. In this respect both Counsel and the Native Commissioner have overlooked the fact that the case was brought in the

Chief's court under Native Law in which contumelia, as such, has no place. Furthermore, Native Law is not as exacting as Common Law in regard to itemising damages: It is perfectly competent to award general damages which include everything that under Common Law would have to be detailed.

King and Towne, Members, concur.

For Appellant: Mr. N. J. S. Goosen, of C. C. C. Raulstone & Co.

For Respondent: No appearance.

NORTH-EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 5/60.

NKOSI *v.* **NKOSI.**

PIETERMARITZBURGH 24TH March, 1960. Before Ramsay, President; King and Towne, Members of the Court.

NATIVE CUSTOM.

Disinherison—Natal Code of Native Law.

Summary: Eldest son and heir "disinherited" by father at family meeting and another son appointed as heir.

Held: That disinherison in Natal can only be effected in terms of section 118 of Natal Code of Native Law.

Held: That a father, under Native Custom, has no right to appoint his heir.

Appeal from the Court of Native Commissioner, Louwsburg.

Ramsay, President:

In view of the remarks on the merits of the case, following hereafter the application for condonation of the late noting of appeal is granted.

In this matter the full details are unessential. Appellant and Respondent are sons of the same father by different mothers. The attorney for the Respondent (Plaintiff) admitted in the Court below that Appellant (Defendant) is the eldest son by the first wife of the parties late father.

The claim in the Chief's Court was: "Plaintiff states Defendant disputes Plaintiff's right to the heirship in the estate of Plaintiff's late father who gave Plaintiff 13 head of cattle when he appointed Plaintiff heir, and while Plaintiff was away Defendant, armed with assegais, removed the 13 head of cattle."

The Chief's judgment was "for the Plaintiff". The Native Commissioner supported this judgment and the Defendant has now brought the matter to this Court.

The above claim consists of two parts—(1) a declaration of rights regarding the heirship and (2) a spoliatory action for 13 head of cattle.

The spoliated cattle have been returned so it is necessary to deal only with the status of the two half-brothers.

The Respondent alleges that Appellant was disinherited by his father who thereupon appointed him as general heir.

It is perfectly clear that the provisions of section 118 of the Natal Code of Native Law were not observed in regard to the alleged disinherison and that therefore there was no disinherison. Appellant is accordingly, as eldest son of the first wife, the general heir of his late father.

The Native Commissioner in his reasons for judgment states that it is abundantly clear that the late father of Plaintiff and Defendant intended to disinherit the Defendant and this was the argument by Respondent's counsel in this Court. The procedure of disinheriting an heir at a public meeting of relatives is the correct procedure in the Union except Natal where the Code provides otherwise by requiring that an inquiry shall be held by the chief with an appeal to the Native Commissioner. Failure to observe this procedure cannot be condoned. The Chief or the Native Commissioner may have disagreed with the father and declined to disinherit the eldest son.

The Native Commissioner furthermore in his reasons is satisfied that the deceased appointed Plaintiff (Respondent) as his heir and informed his Chief accordingly.

The deceased had no right to appoint his heir, unless he made a valid will; in the absence of which the succession follows the course laid down by Section 110 of the Code.

The appeal succeeds with costs and the Chief's judgment in favour of Respondent is altered to "Judgment for Defendant with costs—Defendant being declared the general heir of the late Jakaja Nkosi."

King and Towne, Members, concur.

For Appellant: Adv. A. S. K. Pitman instructed by Messrs G. D. Havemann & Co.

For Respondent: Adv. M. J. Strydom instructed by Mr. A. E. Language.

NORTH-EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 11/60.

GUMEDE *v.* MKIZE.

PIETERMARITZBURG: 22nd March, 1960. Before Ramsay, President, King and Towne, Members of the Court.

PRACTICE AND PROCEDURE.

Default judgment—Application for rescission—Wilfulness of default—Onus—dilatoriness in dealing with case.

Summary: Defendant, following a default judgment against him, applied for rescission which was refused on the ground that he had not discharged an onus on him to prove his default was not wilful.

Held: That a default must be wilful and not due to mere foolishness or negligence and that the onus of proof of wilfulness rests on the Respondent in the rescission action.

Authority referred to:

Jones and Buckle, 6th Edition, page 678.

Appeal from the Court of Native Commissioner, Pietermaritzburg.

Ramsay (President):

The application for condonation of the late noting of appeal is granted in the circumstances disclosed by the affidavits.

In this matter summons was issued on the 30th March, 1957, against William Kuzwayo and the summons reads: "You are hereby summoned that you do at or before a.m. on the day of 195 enter or cause to be entered....."

Defendant entered an appearance to defend on the 16th April, 1957, and filed a plea on the 10th May, 1957. These documents are headed "Polly Mkize *v.* William Gumede" and should have been rejected by the Clerk of Court.

Up to this date there is no indication of the date of trial.

The next document in the record is headed "Notice of Re-instatement" and sets the hearing down for the 22nd August,

1958. It may here be mentioned that the Rules of Court make no mention of a notice of re-instatement.

On the 22nd August, 1958, the Defendant was in default and judgment was given against him.

On the 5th February, 1959, application was made for rescission of the default judgment, supported by affidavits, and after the evidence of the applicant was heard, the application was refused on the 12th October, 1959—two years and seven months after the issue of summons.

The Defendant now appeals against the refusal to rescind.

In his evidence and affidavit, Defendant maintains that the name Gumede is unknown to him but he is somewhat unconvincing.

In an affidavit by a clerk employed by Defendant's attorney, however, the clerk states that he advised Defendant by letter that the trial had been set down for the 23rd August, 1958, not the 22nd as appears in the "Notice of Re-instatement". Defendant denies receiving any letters from his attorneys and it took him from 22nd August, 1958, to the 5th February, 1959, to come forward with his application for rescission. In argument it was stated that he awoke to the facts when a warrant of execution was served on him. This warrant does not figure in the record. His explanation for his default may mean either that it was wilful or that he was foolish and negligent. The Native Commissioner found that the onus was on Defendant to show that his default was not wilful and quotes in support Jones and Buckle, 5th Edition, page 398. His attention is directed to the 6th Edition at page 679 which states that the onus of proof of wilfulness rests on the Respondent.

In the present case Defendant is sued for the considerable amount of £122 and his plea discloses a reasonable defence. It is hardly imaginable that he would wilfully let judgment for such an amount go by default. He has certainly been negligent but this is not a factor that can be taken into consideration. Plaintiff has failed to prove that Defendant's default was wilful.

The appeal is allowed with costs and the Native Commissioner's decision is altered to "Application granted with Costs".

Attention must be drawn to the extreme dilatoriness in bringing this case to conclusion.

Native Commissioners' Court were established to provide a cheap and easy method of litigation for Natives and their purpose is defeated if cases are not dealt with expeditiously.

King and Towne, Members concur.

For Appellant: Adv. M. J. Strydom instructed by Messrs. Jasper R. N. Swain & Co.

For Respondent: No appearance.

SOUTHERN NATIVE APPEAL COURT.

DWESINI *v.* KULAKULE.

N.A.C. CASE No. 30 OF 1959.

UMTATA: 5th February, 1960. Before Balk, President, Yates and Botha, Members of the Court.

EVIDENCE.

Evidence—Presiding officer bound by four corners of record.

The following is an excerpt from the judgment in this case, the remainder of the judgment not being material to this report:—

> Balk (President): . . . Then, the note made by the Native Commissioner in the record and his reasons for judgment indicate that after the parties had concluded adducing evidence, he had recourse to certain tax cards in arriving at the finding of the approximate ages of some of the witnesses and that he took this finding into account in deciding the case. This procedure was grossly irregular in that it

amounted to the Native Commissioner having gone outside the four corners of the record to reach a decision in the case as the tax cards were not before the Court in that they had not been handed in at the trial. It was submitted for Respondent that the Native Commissioner was entitled to refer to the tax cards as he had intimated to the parties' attorneys that he proposed doing so and they had not objected. But this does not alter the fact that he had no right to have recourse to the tax cards for the reasons given.

Yates and Botha, Members, concurred.
For Appellant: Mr. K. Muggleston, Umtata.
For Respondent: Mr. F. G. Airey, Umtata.

SOUTHERN NATIVE APPEAL COURT.

THINTA *v.* **THINTA.**

N.A.C. CASE No. 41 OF 1959.

KINGWILLIAMSTOWN: 25th February, 1960. Before Balk, President, Yates and Gold, Members of the Court.

LANDLORD AND TENANT.

Landlord and Tenant—person living with registered owner on site in Municipal location neither a bona fide possessor nor a bona fide occupier and has no lien.

Summary: The material facts appear from the written judgment of the Court.

Balk (President):

In a Native Commissioner's Court the Plaintiff (now Respondent) sought an ejectment order against the Defendant (present Appellant) from a certain site in a Municipal location averring, *inter alia,* that she was the registered owner thereof (corrected later in the pleadings to registered occupier) and that the Defendant had lived there without her permission since about 1941 and was a trespasser.

In his plea the Defendant denied that he was a trespasser and stated that he had resided on the site with the permission of the registered occupiers thereof for many years, that in about 1956 the Plaintiff had revoked this permission, that during the period of his bona fide occupancy of the site he had at his own expense and with the registered occupier's consent effected necessary and useful improvements thereon costing £365 and that he occupied and was entitled to retain occupation of the site by virtue of his lien pending payment to him by the Plaintiff of compensation for the improvements.

The Defendant preferred a counterclaim for £365 against payment of which he tendered occupation of the site.

The Plaintiff denied in her replication and plea to the counterclaim that the Defendant had spent £365 on improvements on the site or that he had a lien, but admitted that he had contributed a sum of £20 towards building and fencing material. She added that the Defendant had no claim for a refund of this amount as she had set it off against the rental owing to her in respect of his occupation of the property, she having informed him in about 1941 that he would have to pay a rental of £1 per month if he wished to remain in occupation. She also pleaded specially that if he had spent any money on improving the property, any claim for a refund was prescribed.

The Native Commissioner entered judgment for the Plaintiff in convention, with costs, on both the claim and counterclaim.

The appeal against that judgment is brought on the following grounds:—

" 1. The Native Commissioner erred in fact in that:—

(i) He should have found that the Defendant was a reliable witness and have accepted his evidence.

(ii) He should have found as a fact that the Defendant effected the useful improvements alleged by him at his expense.

(iii) He should have held that the Defendant accepted full responsibility for the premises in dispute and occupied the said premises with his parents' leave and licence, and effected the improvements with their knowledge and consent.

(iv) He should have found that the Defendant paid the site rental of the property in dispute since 1932.

2. The Native Commissioner erred in Law in that:—

(i) He should have found, on the evidence, that the Defendant was the bona fide occupier of the premises in dispute.

(ii) He should have held that the Defendant, being the bona fide occupier, had a lien over the said premises in respect of the useful improvements effected thereon by him.

(iii) He should not, in the circumstances, have ordered the ejectment of the Defendant.

(iv) He should have awarded the Defendant the sum claimed as and for compensation for the useful improvements effected by him on the premises in dispute."

It is common cause that the site is the property of the Municipality, that the previous registered occupier thereof was the Plaintiff's husband, that the latter met with an accident in 1931 as a result of which he could not work again and that after his death in about 1941 she inherited his half of the estate by virtue of a marriage in community and became the registered occupier of the site. It is also common cause that the Defendant is their younger son, that he lived on the site since prior to the time when the improvements thereon, consisting of a five-roomed house, two outside rooms and a fence, were effected and that he occupied portion of the house.

According to the Plaintiff's evidence, her late husband built and paid for the house and one of the outside rooms and the Defendant erected the other outside room using the material obtained from a rondavel on the site to do so. The Defendant also paid for the fence which he put up in place of an existing one without her permission. Her other son, Albert, and her daughters contributed to the cost of the buildings. The Defendant also contributed £10 towards the building material. He made no other contribution of any kind. She had called upon him to pay a rental of £1 per month but he did not pay it.

The Defendant stated in his evidence that he had lived on the site since childhood. He was obliged to leave school in 1931 on account of the accident that year to his father which resulted in the latter's being unable to work again. The Plaintiff did not take up employment. His brother, Albert, left home in 1934. After the injury to his father, he (Defendant) provided the money for the site rental. At the request of his father and the Plaintiff, he demolished the mud hut in 1935 and in its place be built the five-roomed house at his own expense in 1935-1936. He was given to understand by them that he should erect the buildings and remain there and look after the family which he did. He

paid for the materials and the two outside rooms and of the fence. The first outside room was built by him in 1936 with his father's approval. The latter died in 1941. The Plaintiff did not object to the erection by him of the other room in 1948 nor of the fence in 1951. The Plaintiff had told him to leave the property. He was willing to do so subject to his being paid by her for the improvements.

It is manifest from the Defendant's plea and his evidence that during the period when the improvements were effected, his father and after the latter's death, the Plaintiff, was the registered occupier and actually in occupation of the site with the intention of so holding it and that the Defendant throughout that period merely lived with them in the same house with their permission so that the legal position is that first the Defendant's father and then the Plaintiff, and not the Defendant, was the occupier of the site at that time. It follows that the Defendant was neither a bona fide possessor nor a bona fide occupier of the site at the time when he effected the improvements so he has no lien on that score. That being so and as the Plaintiff had duly given the Defendant notice to vacate the site, he was in the position of a trespasser and the Native Commissioner properly found for the Plaintiff on the claim in convention.

The learned President then went on to a consideration of the counterclaim which is not material to this report.

Yates and Gold, Members, concurred.

For Appellant: Mr. E. Heathcote of King Williams Town.

For Respondent: Mr. T. Stewart of King Williams Town.

SOUTHERN NATIVE APPEAL COURT.

MASOTSHA *v.* **MASOTSHA.**

N.A.C. CASE No. 46 OF 1959.

UMTATA: 3rd February, 1960. Before Balk, President, Yates and Olivier, Members of the Court.

PRACTICE AND PROCEDURE.

Appeal from Chief's Court—failure to adduce evidence where both parties present renders judgment in favour of party on whom onus of proof rests void aborigine.

Summary: In an appeal from a Chief's judgment for Plaintiff, the Native Commissioner, after hearing evidence in connection with an application for a postponement by Defendant's attorney in his client's absence, and without having adduced any evidence on the merits of the case, dismissed the appeal, with costs. His decision in regard to the application was not recorded. The onus of proof rested on the Plaintiff.

The Defendant subsequently applied for a rescission of this judgment. The Native Commissioner dismissed this application, with costs, holding that he was not empowered under either paragraphs (*a*) or (*b*) of Rule 73 of the Rules for Native Commissioners' Courts to grant it.

The appeal was brought against this latter decision.

Held: That the Native Commissioner was correct in holding that he was not empowered under paragraph (*a*) of Rule 73 of the Rules for Native Commissioners' Courts to grant the application for rescission of the judgment.

Held Further: That the Native Commissioner's judgment dismissing the appeal without any evidence whatsoever having been adduced before him on the merits of the case constituted so gross an irregularity as to render his judgment void *ab origine,* and, that being so, he was empowered to grant the application for a rescission of the judgment under paragraph (*b*) of Rule 73 of the Rules for Native Commissioners' Courts.

Cases referred to:

Ngwane *v.* Vakalisa, 1960 (1) P.H., B.8 (S.N.A.C.).
Labuschagne *v.* Van Schalkwyk, 53 P.H., F.34 (O.P.D.).
Mperu and Others *v.* Ngasala, 26 S.C. 531.
Civil Practice of Magistrates' Couts by Jones and Buckle (Sixth Edition).

Balk (President):

This case had its inception in a Chief's Court in which the Plaintiff (now Respondent) obtained judgment against the Defendant (present Appellant) in a certain civil action.

An appeal against that judgment was noted by the Defendant to the Native Commissioner's Court whereupon written pleadings in terms of sub-sections (1) and (2) of Section 12 of the Regulations for Chiefs' Civil Courts were filed by the parties in the Native Commisioner's Court.

In his plea so filed, the Defendant denied the main averments on which the Plaintiff based his claim so that the onus of proof on the pleadings in the Native Commissioner's Court rested on the Plaintiff.

On the date to which the hearing of the appeal in the Native Commissioner's Court had been postponed, the Defendant's attorney, in his client absence, applied for a further postponement on the ground of the latter's illness.

After hearing evidence solely in connection with that application, the Native Commissioner's Court dismissed the appeal, with costs.

That Court's decision on the application was not recorded as should have been done. This aspect, however, calls for no further consideration as it is not material to the instant appeal.

The Defendant applied to the Native Commissioner's Court for the rescission of its judgment dismissing the appeal, filing an affidavit which complied with the requirements of Rule 74 (2) of the Rules for Native Commissioners' Courts.

The Native Commisisoner's Court dismissed that application, with costs, holding that it was not empowered under either paragraph (*a*) or paragraph (*b*) of Rule 73 of the said Rules to grant it.

The appeal to this Court is against that decision and is brought on the ground, *inter alia,* that the Native Commissioner's Court erred in law in refusing to exercise its judical discretion in the matter of the application for rescission.

Sub-section (4) of Section 12 of the Regulations for Chiefs' Civil Courts provides that an appeal from the judgment of such a Court to the Native Commissioner's Court shall be re-heard and re-tried by the latter Court as if the case were one of first instance in that Court so that impliedly the Rules for Native Commissioners' Courts apply in the disposal of such an appeal.

Rule 73 lays down, *inter alia,* that the Native Commissioner's Court may upon the application by any person affected thereby—

(*a*) rescind or vary any judgment given by it in the absence of the person against whom such judgment was given;

(*b*) rescind or vary any judgment given by it which was void *ab origine.*

As decided by this Court in Ngwane *v.* Vakalisa, 1960 (1) P.H., R. 8 (S.N.A.C.), the word "person" in paragraph (*a*) of Rule 73 includes a party to an action and, therefore, also, in terms of the definition of "party" in Rule 96 (1), a legal practitioner

appearing for a party to an action. It follows that, as was submitted for the Respondent and conceded on behalf of the Appellant, it is not competent for a Native Commissioner's Court to rescind a judgment given by it against the party to an action in his absence if, as in the instant case, he was represented at the hearing thereof by his attorney.

The Native Commisisoner's Court was, therefore, correct in holding that it was not empowered to grant an application for rescission under paragraph (*a*) of Rule 73.

Turning to the position under paragraph (*b*) of that Rule, the record does not disclose why the Native Commisisoner dismissed the appeal. If, in so doing, he placed reliance on Rule 87 (2), he was wrong as that Rule sanctions a finding for the Plaintiff, to which the dismissal of the appeal by the Native Commisisoner is tantamount, only if both the Defendant and his attorney do not appear at the trial for the term "Defendant" in Rule 87 (2) includes his attorney in view of the definition of that term in Rule 96 (1), see Labuschagne *v.* Van Schalkwyk, 53 P.H., F. 34 (O.P.D.), and in the instant case the Defendant's attorney represented him at the trial i.e. at the hearing of the appeal in the Native Commissioner's Court.

As pointed out above, the onus of proof on the pleadings in the Native Commisisoner's Court rested on the Plaintiff and it is manifiest from the record that no evidence whatsoever regarding the merits of the appeal was adduced in that Court at the hearing thereof. In these circumstances the Native Commissioner's judgment for the Plaintiff, i.e. the dismissal by him of the appeal, amounted to a gross irregularity for as stated in Mpemvu and Others *v.* Nqasala, 26 S.C. 531, at page 534, "To give judgment against a man with no evidence whatever against him seems to be a greater irregularity than to reject legal evidence or admit illegal evidence, for it ignores the very object for which all rules of evidence exist".

It was submitted for Respondent that the judgment of the Native Commissioner's Court dismissing the appeal was not void as that Court had jurisdiction and the parties were properly before it and as evidence need not necessarily be adduced at a trial. But this submission loses sight of the fact that here it was essential for the Plaintiff to adduce evidence before a decision in his favour could be given and that the finding for him without any evidence constituted an irregularity so gross as to justify the conclusion that there had in fact been no proper trial. Consequently, as contended for Appellant, the irregularity constituted a complete negation of the provisions of sub-section (4) of Section 12 of the Regulations for Chiefs' Civil Courts, which are clearly peremptory, and invalidated the proceedings including the judgment dismissing the appeal. This view is strengthened by the fact that the opinion has been expressed that a gross irregularity invalidates the whole of the proceedings, see the passage appearing at the end of the first paragraph on page 286 of *The Civil Practice of Magistrates' Courts* by Jones and Buckle (sixth edition). The Native Commissioner's judgment dismissing the appeal was, therefore, void *ab initio* and he was empowered to hear the application for its rescission under Rule 73 (*b*). Accordingly, his finding to the contrary it wrong and his judgment dismissing the application should accordingly be set aside and the application remitted to him for hearing in the light of the provisions of Rule 74 (5), which apply by virtue of Rule 74 (8), as was conceded on behalf of both the Appellant and the Respondent, see Maseti *v.* Maseti, 1954, N.A.C. 214 (S), at page 216, and Pillay *v.* Bodasingh and Another, 1950 (4) S.A. 241 (N.P.D.), at pages 245 and 246.

In the result the appeal falls to be allowed, with costs, and the judgment of the Native Commisisoner's Court dismissing the application for rescission to be set aside and the application remitted to it for hearing on the meits.

Yates and Olivier, Members, concurred.

For Appellant: Mr. R. Knopf of Umtata.

For Respondent: Mr. K. Muggleston of Umtata.

SOUTHERN NATIVE APPEAL COURT.

SIJAKO *v.* NONTSHEBEDU.

N.A.C. CASE No. 52 OF 1959.

UMTATA: 25th May, 1960. Before Balk, President, Yates and Blakeway, Members of the Court.

NATIVE CUSTOM.

Customary Union—claim for refund of lobola—where return of wife not genuine. Practice and Procedure—Pleadings—provision of Rule 45 (5) *of Rules for Native Commissioners' Courts not applicable in appeals from Chief's Courts.*

Summary: Plaintiff (now respondent) successfully sued defendant (present appellant) in a Chief's Court for the return of his wife failing which the refund of the dowry paid for her. An appeal to the Native Commissioner's Court was dismissed.

It emerged from the evidence that Plaintiff's wife deserted him and returned to her father's kraal. Plaintiff subsequently went to *putuma* her and she returned to his kraal where she stayed for one week and thereupon again left him for no apparent reason. Plaintiff reported the subsequent desertion to the defendant.

The defendant appealed to this Court, *inter alia,* on the ground that the Native Commissioner erred in finding that Plaintiff's wife had returned to Defendant's kraal.

Held: That the return of Plaintiff's wife to him cannot be regarded as having been a genuine return and that therefore her leaving again after the week's stay cannot be regarded as further desertion but forms part and parcel of the initial desertion when she returned to the Defendant's kraal and was *putumaed* by the Plaintiff. It was consequently not incumbent on the Plaintiff to show that after the week's stay his wife had again returned to the Defendant's kraal or that he had then again *putumaed* her, it sufficing that he reported to the Defendant that she had left him again.

Addendum: The Native Commissioner wrongly applied the provisions of Rule 45 (5) of the Rules for Native Commissioners' Courts to the defence as restated in his Court as this rule has reference solely to pleas in cases of first instance in Native Commissioner's Courts. Defences in appeals to Native Commissioner's Courts from Chiefs' Civil Courts are governed by section 12 of the Regulations for the lastmentioned Courts.

Cases referred to:

Sibovana *vs.* Dlokova, 1 N.A.C. (S.D.) 281, at page 282.

Appeal from Judgment of the Native Commissioner at BIZANA.

Balk (President):

This case had its inception in the Court of a Chief's Deputy who entered judgment for Plaintiff as prayed, with costs, on his claim against his customary wife's father, the defendant, for her return or, failing which, for the return of the dowry paid for her as specified. An appeal by the Defendant to the Native Commissioner's Court against that judgment was dismissed, with costs, the latter judgment being altered in respects which are not material to the appeal to this Court which is brought by the Defendant on the following grounds:—

"1. That the judgment is against the weight of the evidence and the probabilities of the case.

2. That the Native Commissioner erred in finding that the Plaintiff was entitled to judgment for the return of his wife or the restoration of his dowry merely by proving the desertion and without having to prove that she returned to Defendant's kraal.
3. That the Native Commissioner erred in rejecting Defendant's defence that the father of a deserting wife is not obliged to refund dowry unless the wife returns to his kraal.
4. That the Native Commissioner erred in finding that the Plaintiff's wife Maluqoqweni, returned to Defendant's kraal."

As pointed out by Mr. Muggleston in this Court in his argument on behalf of the Appellant, the Native Commissioner erred in applying Rule 45 (5)—inadvertently quoted by him as 44 (5)—of the Rules for Native Commissioner's Courts to the defence as restated in his Court as this rule has reference solely to pleas in cases of first instance in Native Commissioners' Courts. Defence in appeals to Native Commissioners' Courts from Chiefs' Civil Courts are governed by section 12 of the Regulations for the lastmentioned courts. This aspect is, however, unimportant since the appeal in any event fails as will be apparent from what follows.

The Native Commissioner found, *inter alia,* the following facts proved:—

"4. (1) Maluqoqweni (Plaintiff's wife) deserted Plaintiff and left his kraal. Plaintiff found her at the kraal of her father, the Defendant.

(2) Plaintiff discussed the desertion with Defendant and with Maluqoqweni. The latter told Defendant that he should return the dowry cattle to Plaintiff, and that she did not want to return to Plaintiff. Maluqoqweni refused to return to Plaintiff's kraal.

(3) She did, however, return to Plaintiff and remained at his kraal for one week. She then again deserted."

Mr. Muggleston conceded that he could not attack these findings and, properly so, as the facts in question as testified to by the Plaintiff, are in accordance with the probabilities and are borne out by his witness, Samuel Mkizwana, whereas the defence evidence to the contrary is far less cogent in that Raleka's testimony falls to be treated with reserve in view of the latter's admission that he was not a witness at the Court of the Chief's Deputy and was present in the Native Commissioner's Court when the defendant gave his evidence; and the evidence of the Defendant's witnesses Same and Msitwa, does not assist him as Same's testimony refers to an irrelevant period and that of Msitwa is too indefinite. Here it should be mentioned that, as pointed out by Mr. Muggleston, the evidence of Wilson Mkizwana and Nkanani for the Plaintiff that they had seen his wife is also irrelevant as it also relates to a period subsequent to the institution of the instant proceedings.

As it is clear that after her initial desertion, the Plaintiff's wife refused to return to him and that thereafter she only returned for a week, and then left for no apparent reason, it is difficult to escape the conclusion that such return was not genuine. It follows that her leaving the Plaintiff after her week's stay cannot be regarded as a further desertion but forms part and parcel of the initial desertion. The Plaintiff established that his wife had returned to the Defendant's kraal at the time of her initial desertion and that the plaintiff then fully observed the custom in regard to *putumaing* her, see Sibovana *vs.* Dlokova, 1 N.A.C. (S.D.) 281, at page 282. In the circumstances it was not incumbent on the Plaintiff to show that, after the week's stay, his wife again returned to the Defendant's kraal or that he then again *putumaed* her, it sufficing that he reported to the Defendant that she had left him again. The Plaintiff was, therefore, entitled to judgment.

The appeal to this Court should accordingly be dismissed. No order for costs is called for as the Respondent was in default at the hearing of this appeal.

Yates and Blakeway, Members, concurred.

For Appellant: Mr. K. Muggleston of Umtata.

For Respondent: In default.

NORTH-EASTERN NATIVE APPEAL COURT.

MDLETSHE *v.* MDLETSHE.

N.A.C. CASE No. 53/59.

ESHOWE: 23rd April, 1960. Before Ramsay, President, King Colenbrander, Members of the Court.

PRACTICE AND PROCEDURE.

Reinstatement of lapsed appeal: Negligence by attorney.

Summary: Appellant's respresentative appeared at non-existent session of appeal court at Pietermaritzburg whereas appeal being heard at Eshowe: Attorney presumed case would be heard at Pietermaritzburg and did not read notice of hearing: Application for reinstatement.

Held: That a lapsed appeal may be reinstated if it appears to the Court of Appeal that appellant has a reasonable prospect of success and that circumstances are such as justify the client not being penalised for his attorney's negligence.

Cases referred to:

Balooi *v.* Balooi, 1954 N.A.C. 154.

Rose and Another *v.* Alpha Secretaries Ltd., 1947 (4) S.A.511.

Dhlamini *v.* Kumalo, 1954 N.A.C. 4.

Appeal from the Court of Native Commissioner Mahlabatini.

The relevant portion of the judgment follows:—

Ramsay, (President):

In this matter application is made for reinstatement of the appeal. At the last session of this Court in Eshowe the Appellant was in default and the case was struck off the roll as having lapsed for non-prosecution.

The Appellant's attorney now, in an affidavit, states that he mistook the venue of the Court and made arrangements to be represented at the Pietermaritzburg session whereas the appeal was set down for hearing at Eshowe.

In this matter of reinstatement we have two conflicting decisions of this Court. In Balooi *v.* Balooi, 1954 N.A.C. 154, the learned Permanent Member enunciated the view of the Court: " That this is not a case where the client should suffer for his attorney's negligence to the extent of being denied access to this Court of Appeal and that the application for reinstatement on the roll should be granted." He based his judment on the case of Rose and Another *v.* Alpha Secretaries Ltd., 1947 (4) S.A. 511 (A.D.). In that case the learned judge added: " We presume that Applicant's attorney will not attempt to recover from him as between attorney and client, fees or disbursements in connection with this application, which would have been unnecessary if he had made himself conversant with the rules."

In the case of Dhlamini *v.* Kumalo, 1954 N.A.C., 4, the learned President gave the decision of the Court as follows: That once an appeal has lapsed it cannot be resurrected and therefore an application for the reinstatement of an appeal which has lasped cannot be entertained. He relied for an interpretation of the word " lapse " on the case of Mayor and Corporation of Pietermaritzburg *v.* Union Government 1953 (1) P.H., D 2. In that case the word " lapse " was considered in quite different circumstances and did not apply to the lapsing of an appeal.

This Court affirms the decision in Balooi *v.* Balooi and disagrees with the view expressed in the Dhlamini—Kumalo case as being too drastic and capable of unexpected deplorable results. Let us imagine a counsel representing an appellant who is prevented from reaching the Court in time to answer the calling on of his case because of a road accident, or a delayed train or bus, or for any other reason out of his control. Is his client to be barred from prosecuting his possibly very good appeal because of the misfortune of his legal representative?

Provision is made by Rule 15 for this Court to grant permission for an appeal to be heard at a time other than that for which it was set down, and we cannot agree with the restricted interpretation placed upon the section in the Dhlamini—Kumalo judgment.

In our opinion an application such as the present one should be dealt with in much the same way as is an application for condonation of the late noting of an appeal: The circumstances of the default must be considered together with the chances of success of the applicant in his appeal, bearing in mind any prejudice that many accrue to the respondent.

Although the conduct of the Applicant's attorney shows gross negligence it is apparent from a perusal of the record that the Appellant has a reasonable prospect of success.

The application for reinstatement is accordingly granted.

King and Colenbrander, Members, concur.

For Appellant: Mr. W. E. White instructed by Cyril Cornish & Co.

Respondent in person.

SOUTHERN NATIVE APPEAL COURT.

MDIZENI *v.* NGQOLOSI.

N.A.C. CASE No. 63 OF 1959.

UMTATA: 27th May, 1960. Before Balk, President, Yates and Kelly, Members of the Court.

NATIVE CUSTOM.

Customary Union—claim for refund of lobola—whether duty of husband to continue to putuma wife in cases of recurrent desertions.

Summary: Plaintiff (now Respondent) successfully sued the Defendant (present Appellant) for the return to him of his wife, Nenziwe, failing which the restoration of the dowry paid for her.

According to Plaintiff's evidence Nenziwe left him and returned to her father's kraal. He *putumaed* her on several occasions and she eventually returned to h.m where she stayed for a period of five months and thereupon again left following a difference w.th her mother-in-law.

Plaintiff took no steps to *putuma* his wife after her final desertion following her five months stay.

The appeal was brought, *inter alia,* on the ground that the Native Commissioner erred in holding that it was not necessary for Plaintiff to *putuma* his wife after the second desertion.

Held: That the Plaintiff's evidence that he had *putumaed* Nenziwe after prior desertions did not absolve him from his obligation under Native Law to *putuma* her again after her departure at the end of her five months' stay which in the circumstances constituted a genuine return.

Cases referred to:

Gulani *vs.* Gamkile, 1 N.A.C. (S.D.) 279, at page 282.

Ndzondzo *vs.* Willem 1952 N.A.C. 231 (S), at page 232.

Seymour's Native Law (Second Edition), at page 129.

Zabulana *vs.* Mpandla 4 N.A.C. 103.

Appeal from the Judgment of the Native Commissioner at Mount Fletcher.

Balk (President):

The Plaintiff (now Respondent) sued the Defendant (present appellant) for the return to him of his wife, Nenziwe, or failing which the restoration of the dowry paid for her, viz.: eight head of cattle or their value £8 each.

Judgment was entered for Plaintiff in terms of his prayer except that seven instead of eight head of cattle were made returnable.

The judgment on the counterclaim preferred by the Defendant does not call for consideration as the appeal is confined to the claim in convention.

The appeal is brought on the following grounds:—

"1. That the Native Commissioner erred in holding that Plaintiff's wife had deserted him, and that in view of the numerous discrepancies in the evidence of Plaintiff and his witnesses concerning the alleged assault by Plaintiff's wife upon her mother-in-law and the circumstances under which she left, the evidence of Plaintiff's wife to the effect that she was assaulted and driven away should have been preferred.

2. That in any event the Presiding Officer erred in holding that it was not necessary for Plaintiff to *putuma* his wife and that as on Plaintiff's own admission, he did not *putuma* after his wife had left on the last occasion before summons was issued, he is not entitled to an order for her return."

An application for the condonation of the late noting of the appeal was withdrawn with the leave of this Court in view of its ruling that the appeal had in fact been noted timeously.

Turning to a consideration of the appeal, there are, as pointed out by Mr. Muggleston in his argument on behalf of the Appellant, a number of discrepancies in the evidence for the Plaintiff and there is nothing in the Assistant Native Commissioner's reasons for judgment indicating that he took those discrepancies into account in deciding the case.

The discrepancies are, however, not of such a nature as to warrant the inference that the Plaintiff and his witnesses are unreliable. That being so and in view of the cogency of the Native Commissioner's reasons dealing with the demeanour of the witnesses and the probabilities, he cannot be said to be wrong in finding that Nenziwe had deserted the Plaintiff without just cause as averred by the latter in his summons. It is true that the Native Commissioner's conclusion that the Defendant's denial that the Plaintiff had previously *putumaed* Nenziwe "was

most unconvincing for the obvious reason that the Plaintiff's Attorney would have instructed the Plaintiff to *putuma* his wife had he not been satisfied that this had in fact already been done" is unwarranted as it rests on conjecture and not on the evidence. The Native Commissioner's inference adverse to the Defendant based on the latter's use in Court of the Xhosa language is likewise not justified. But these erroneous inferences do not militate against the Native Commissioner's finding that Nenziwe had deserted the Plaintiff without just cause in view of the cogency of his other reasons referred to above. It follows that the Plaintiff discharged the onus of proof resting on him on the pleadings in that respect. Here it should be mentioned that the onus of proving that the Plaintiff had assaulted Nenziwe and driven her away, as alleged by the Defendant in his plea, rested on the latter so that Mr. Muggleston's submission that the Native Commissioner had approached the incidence of the onus of proof from the wrong angle because the Native Commissioner stated in his reasons that the Defence had not established the allegation in question is not well founded. The first ground of appeal, therefore, fails.

Turning to the second ground of appeal it is manifest from the Plaintiff's evidence that, after the institution by him of the previous action in the Native Commissioner's Court, Nenziwe returned to him for a period of about five months before leaving him following a difference with his mother. There is nothing concrete in the Plaintiff's evidence to show that Nenziwe had not the slightest intention of returning or becoming reconciled to him, as found by the Native Commissioner. On the contrary, her stay with the Plaintiff for so long a period as five months and her leaving him at the conclusion of this period following a difference with his mother, indicate, as submitted by Mr. Muggleston, that her return on this ocassion was genuine. Admittedly, the Plaintiff stated that Nenziwe had left him repeatedly subsequent to the institution of the prior action but from what he said earlier in his evidence, it seems that by "repeatedly" he intended to convey the several occasions after Nenziwe's five months' stay with him when she came back to ask him for her property. The Plaintiff admitted in his evidence that he had not *putumaed* Nenziwe after she had finally left him but it is not altogether clear whether in making this admission the Plaintiff had in mind Nenziwe's departure at the conclusion of her five months stay with him or the subsequent occasions referred to above. Be that as it may, the Plaintiff's evidence is too vague to support a finding that he did *putuma* Nenziwe after her departure at the end of her five months stay with him. The onus of proving such *putuma* rested on the Plaintiff and his failure to discharge this onus militates against the success of his case. The Plaintiff's evidence that he had *putumaed* Nenziwe after prior desertions did not absolve him from his obligations under Native Law to *putuma* her again after her departure at the end of her five months stay. That this is the position is apparent from the principle underlying *putuma* as enunciated in *Gulani vs. Gamkile,* 1 N.A.C. (S.D.) 279, at page 282, viz; "that the matter primarily concerns the husband. It is only after the wife had refused to return to her husband that an obligation is cast on her father, to persuade the wife to return or to restore the dowry." See also *Ndzondzo vs. Willem* 1952 N.A.C. 231 (S), at page 232.

Mr. Knopf in his argument for Respondent contended that it was unnecessary for the Plaintiff to have *putumaed* Nenziwe after her five months' stay. He made this submission on the authority of *Seymour's Native Law* (Second Edition) at page 129. There *Zabulana vs. Mpandla,* 4 N.A.C. 103 is relied upon for the proposition that the husband need not give the wife's guardian a further opportunity of returning her where the guardian has previously returned her in compliance with an order of Court. But, apart from the fact that there was here no previous order of court but only a previous action which was not finalised, *Zabulana's* case, as pointed out by Mr. Muggleston, decided no more than that the subsequent proceedings were not *res judicate* and that case is,

therefore, not an authority for the proposition referred to above. That being so and bearing in mind *Gulani's* and *Ndzonza's* cases (*supra*), Mr. Knopf's contention that *putuma* subsequent to the five months stay was unnecessary is not well founded.

In the circumstances the Native Commissioner should have decreed absolution from the instance, this being the equivalent of the Defendant's prayer in his plea for the dismissal of the summons. It should be added that in his plea the Defendant relied upon the Plaintiff's failure to *putuma* Nenziwe.

In the result the appeal falls to be allowed, with costs, and the judgment of the Native Commissioner's Court altered to one of absolution from the instance, with costs.

Yates and Kelly, Members, concurred.

For Appellant: Mr. K. Muggleston of Umtata.

For Respondent: Mr. R. Knopf of Umtata.

NORTH-EASTERN NATIVE APPEAL COURT.

NTULI *v.* MPANGA.

N.A.C. CASE No. 1 OF 1960.

ESHOWE: 22nd April, 1960. Before Ramsay, President, King and Colenbrander, Members of the Court.

SEDUCTION.

Possible periods of gestation: Hlobonga custom.

Summary: Plaintiff delivered a child, which on her evidence was conceived 11 months previously: Alternative claim for damages for seduction.

Held: That a human period of gestation lasting 11 months is not possible.

Held: That hlobonga is not actionable under Native law.

Works referred to:

Taylor: Principles and Practice of Medical Jurisprudence, 10th Edition.

Stafford and Franklin: Native Law.

Appeal from the Court of the Native Commissioner, Eshowe.

The relevant portions of the judgement follow:—

Ramsay, (President):

She states she had connection with Defendant in December 1956, up to the middle of January 1957 and thereafter in July 1957.

She gave birth to a normal child on the 24th December 1957 of which she states Defendant is the father.

She states she is aware that the normal period of pregnancy is 9 months, but that she was pregnant for 11 months.

The girl's evidence, supported by the Defendant, is perfectly clear to the effect that between the middle of January to the 3rd July 1957, they did not meet.

From the middle of January 1957 to the 24th December 1957 is 343 days. From the beginning of July 1957 to the 24th December 1957 the number of days is 177.

The normal period of gestation is 280 days so this child, if Defendant was the father, must have taken either 343 days (49 weeks) or 177 days from conception to birth.

According to Taylor's Medical Jurisprudence a human gestation period resulting in a living child of 177 days would be impossible. In regard to the longer period, Taylor (tenth edition) says on page 39 "That gestation may be retarded or protracted beyond the fortieth week is now, probably, not disputed by any obstetric writer of reputation." Cases are quoted; one in which an English court accepted evidence of a pregnancy extending to 331 days, and gynaecologists have stated that although they would not say that a pregnancy of 300 days was absolutely impossible they believed it to be so improbable as to be practically incredible.

The same work states that usually with prolonged pregnancy, the child at birth is larger than the normal, but in this case the evidence is to the effect that the baby was small but normal.

This Court is not convinced that an 11 months gestation period is possible in a human being.

Plaintiff's second ground of appeal is as follows:—

In view of the legal presumtion of virginity, even if it were correctly held that paternity had not been proved, the Plaintiff should nevertheless have been awarded damages for seduction.

The Native Commissioner has found that the Defendant did not seduce the Plaintiff but that over a period of some 6 to 7 years the parties had indulged in the practice of "hlobonga" i.e. external intercourse. Hlobonga gives no rise to a claim for damages. (Stafford and Franklin, page 228).

The appeal is dismissed with costs.

King and Colenbrander, Members, concur.

For Appellant: Mr. W. E. White of Eshowe.

For Respondent: Mr. B. Wynne of Wynne & Wynne of Eshowe.

NORTH-EASTERN NATIVE APPEAL COURT.

CINDI *v.* MOYO.

N.A.C. CASE No. 2/1960.

PRETORIA: 24th May, 1960. Before Ramsay, President, King and Backer, Members of the Court.

PROCEDURE.

Custody of child on dissolution of customary union—Order for delivery of child—Agreement re custody made without consultation with mother or ascertaining what is in interests of child —Foreign Native.

Summary: Plaintiff, a Rhodesian, sued his father-in-law for custody of two children of the union after the latter refunded lobola. By agreement, made an order of court, the children were to remain with their mother, now remarried, until each attained the age of 7 years. When the eldest child attained that age Plaintiff sued the mother for delivery of the child and obtained judgment. The mother now appeals.

Held: That the agreement was invalid in that the mother had not been joined in the action for custody nor had any attempt been made to ascertain what would be in the interests of the child concerned.

Cases referred to:

Hendrik Mutundaba *v.* Alfred Morenwa, 1951 N.A.C., 326.
Mbenyane *v.* Hlathwayo, 1953 N.A.C., 284.
Matheyane *v.* Matheyane & Koee, 1954 N.A.C., 66.
Kabe & Inganga *v.* Inganga, 1954 N.A.C., 220.
Ndhlovu *v.* Ndhlovu & Another, 1954 N.A.C., 183.
Maodi *v.* Maodi, 1959 N.A.C., 1.

Appeal from the Court of Native Commissioner, Pretoria.
Ramsay, (President):

Kenneth Moyo, a Rhodesian, married Norah Cindi by Native custom and there were two children of the union.

Norah deserted Kenneth and her father William voluntarily refunded the lobola paid.

Kenneth later sued William for the custody of the two children mentioned.

An order was made on 18th April, 1955, giving Norah custody of the children until each attained the age of 7 years.

Now the elder child, Lydia, has attained the age of 7 years and Kenneth applied for an order of court compelling Norah to hand over Lydia to Kenneth. The application cited Norah as respondent, but Norah has in the meantime re-married by custom one Baloyi.

The application was granted on 23rd November, 1959, and Norah appeals on the grounds that she has no *locus standi,* that Kenneth, being in the nature of a peregrinus is not a fit and proper person to have custody of Lydia, and that the Native Commissioner should have heard evidence on the point.

We will first consider the application for an order directing the respondent (Norah) to hand over the minor child Lydia to Kenneth.

In Maodi *v.* Maodi, 1959 N.A.C. 1 at page 2 this Court dealt with the competence of an order for delivery of a child and there is a legal means of enforcing an order for the delivery of a minor child. (See also Gardiner and Landsdown, Sixth Edition, page 1124).

The order made on the 23rd November, 1959, was therefore in itself competent.

The original order for custody made on the 1st April, 1955, however, ignored the decisions of this Court in regard to the mother of minor children being cited in an action for custody. [See Hendrik Mutundaba *v.* Alfred Morenwa, 1951 N.A.C. (N.E.), 326, and Mbenyane *v.* Hlatshwayo, 1953 N.A.C., 284].

It also ignored decisions on the prime point in awarding the custody of children—bearing in mind the father's rights—viz: the interest of the children themselves. No evidence was taken to ascertain what would be best for the children. (Matheyane *v.* Matheyane and Koee, 1954 N.A.C. 66. Kabe and Inganga *v.* Inganga, 1954 N.A.C. 220; Ndhlovu *v.* Ndhlovu and Ano, 1954 N.A.C. 183).

No appeal was noted against the original custody order, which was made by agreement between the attorneys then representing the parties, but, in the interests of the two minors concerned, that order cannot be left to stand. This Court, acting under the powers vested in it by Section 15 of the Native Administration Act, No. 38 of 1927, as amended, accordingly deletes that order.

Proceedings for a declaration of custody can now be taken afresh and evidence adduced to show where the interests of the child (or children) lie: Proceedings in which the woman should be assisted by her husband and be joined with William.

The appeal is allowed.

In regards to costs of this appeal, the ground that Norah had no *locus standi* in the application proceedings is valid but that plea was never raised in the court below. The point whether Kenneth is a fit and proper person to have custody has yet to be decided after the hearing of evidence.

The last ground of appeal, that the Native Commissioner should have heard evidence on the application, carries no weight. The Native Commissioner was merely asked to enforce an order already made.

As the present Appellant has not succeeded on her grounds of appeal, there will be no order as to costs.

It may be mentioned that Respondent's counsel has conceded that the most effective solution would be to have the matter referred back for evidence, with no order as regards the costs in this Court.

King and Backer, Members, concurred.

For Appellant: Mr. A. P. Nel of Nel & Nel.

For Respondent: Adv. W. Barnard instructed by Messrs. Austin, Goudvis & Kuyper.

SOUTHERN NATIVE APPEAL COURT.

GQOZI v. MTENGWANE.

N.A.C. CASE No. 2 OF 1960.

UMTATA: 2nd June, 1960. Before Balk, President, Yates and Durno, Members of the Court.

NATIVE CUSTOM.

Damages for adultery—Customary union—father of wife of existing customary union giving daughter in second customary union liable to husband of existing union for damages for resultant adultery. Lobola—child born of second union to be taken into consideration in arriving at deductions in claim for restoration of dowry paid in respect of first union.

Summary: The Plaintiff (now Respondent) sued the Defendant (present appellant) in a Native Commissioner's Court for eight head of cattle or their value, £15 each.

Plaintiff alleged that during his absence his wife by customary union, Nofezile, committed adultery with one Moshani; that the latter thereupon paid five head of cattle to Nofezile's father (Defendant) as damages and that thereafter on payment of a further three head of cattle Nofezile's father gave her in marriage to Moshani. A child of the union between Moshani and Nofezile was subsequently born.

Plaintiff claimed the five head of cattle already paid to the Defendant in respect of damages due to him and three head as return of dowry after allowing for the customary deductions consisting of a beast for the child of the union between him (Plaintiff) and Nofezile and another for the wedding outfit. Plaintiff adduced no evidence in support of the avernment that five head of cattle had been paid to Defendant as damages. Defendant, however, admitted that he had received eight head of cattle from Moshani as dowry for Nofezile.

Held: That, even although the Plaintiff adduced no evidence to the effect that five head of cattle had been paid to the Defendant as damages, his claim against the Defendant for such damages is nevertheless competent in view of the Defendant's admission that he had received eight head of cattle from Moshani as dowry for Nofezile and had given her to him in a customary union during the subsistence of the customary union between the Plaintiff and Nofezile.

Held further: That, as the child born as a result of Nofezile's adultery with Moshani was born during the subsistence of the customary union between herself and Plaintiff it is deemed to be a child of this union as this child was not repudiated by the Plaintiff and a beast is deductable in respect thereof from the dowry to be restored to plaintiff.

Cases referred to:

Xanase *vs.* Tunce, 1939 N.A.C. (C. & O.) 36, at page 37.
Gijana and Another *vs.* Mangali, 1946 N.A.C. (C. & O.) 60.
Sibiya *vs.* Ndhlela, 1953 N.A.C. 217 (N.E.), at page 218.
Mangqashe *vs.* Nkontani, 3 N.A.C. 61.
Memani *vs.* Makaba, 1 N.A.C. (S.D.) 178, at page 179.
Hagile *vs.* Mehlwana, 5 N.A.C. 16.
Sicefe *vs.* Nyawozake, 5 N.A.C. 17.
Tobiea *vs.* Mohatla, 1 N.A.C. (S.D.) 91, at page 92.
Loliwe *vs.* Mnyuko, 1945 N.A.C. (C. & O.) 15, at page 16.
Radoyi *vs.* Ncetezo, 2 N.A.C. 174, at page 176.

Appeal from the Judgment of the Assistant Native Commissioner at Mqanduli.

Balk (President):

The Plaintiff (now Respondent) sued the Defendant (present Appellant) in a Native Commissioner's Court for eleven head of cattle or their value as specified in the summons.

At the trial in that Court the claim was reduced by the Plaintiff's Attorney to eight head of cattle of their value, £15 each.

Five of these eight head of cattle were claimed by the Plaintiff on the ground that they had been paid to the Defendant by one Moshani as damages for adultery committed by the latter with the Plaintiff's customary wife, Nofezile, who, it was further alleged in the summons, had thereafter been given by her father, the Defendant, in marriage to Moshani upon payment by the latter of a further three head of cattle to the Defendant during the subsistence of her customary union with the Plaintiff. The remaining three of the eight head of cattle were claimed by the Plaintiff in respect of the return of the dowry he alleged he had paid to the Defendant for Nofezile, *viz*; five head of cattle less the customary deductions consisting of a beast for the child of the union and another for the wedding outfit.

In his plea the Defendant denied that the Plaintiff had contracted a customary union with his daughter, Nobantu, and alleged that five head of cattle had been paid to him by the Plaintiff as damages for having rendered Nobantu pregnant. The Defendant also denied therein that he had received five head of cattle from Moshani as damages for adultery with Nofezile but admitted that he had given Nobantu in marriage to Tanase Moshani who had paid him eight head of cattle as dowry for her.

Here it should be mentioned that it is apparent from the evidence that Nofezile and Nobantu are one and the same person and that the word " marriage " in the pleadings was used to denote a marriage by Native custom, i.e. a customary union.

The Native Commissioner's Court gave judment for Plaintiff for five head of cattle or their value, £15 each, and three head of cattle or their value £10 each, with costs.

The appeal from that judgment is brought on the ground that it is against the weight of the evidence and probabilities of the case.

At the inception of his argument on behalf of the Appellant, Mr. Knopf raised the question whether the husband can claim the return of the dowry paid for his wife in respect of their customary union without such a claim being made contingent upon her failure to comply with an order of Court for her return to him where, as in the instant case, her father during the subsistence of her said customary union obtained a second dowry for her from another man and purports to give her to such other man in another customary union. The decisions on this point are not consistent, see *Xanase vs. Tunce,* 1939 N.A.C. (C. & O.) 36, at page 37, and *Gijana and Another vs. Mangali,* 1946 N.A.C. (C. & O.) 60. As properly conceded by Mr. Knopf after he had been accorded an opportunity of going further into the matter, this Court is not called upon to resolve this question of law here as it is not covered by the existing ground of appeal and application in terms of Rule 16 read with Rule 12 of the Rules of this Court was not made for the introduction of an additional ground of appeal in respect of the legal point involved, see *Sibiya vs. Ndhlela,* 1953 N.A.C. 217 (N.E.), at page 218.

The Plaintiff's case, according to the evidence adduced by him, is, briefly, that he had ascertained from Nofezile at an *ntlombe* who she was and had then sent messengers to the defendant to ask for her in a customary union. At the defendant's request he went to see him. Five head of cattle were paid by word of mouth and two further cattle were promised as dowry for Nefezile. The Defendant's messengers came to see the five head of cattle. Thereafter the Defendant's people brought Nofezile and left her with him (Plaintiff) as his wife. He slaughtered a sheep when she was brought to him. When the Defendant's people left they warned him against Nyangibomvu's son as he had *twalaed* Nofezile previously and had paid two head of cattle as damages in connection therewith. They also told him that as a result of this *twala* Nofezile had an ailment which prevented her from becoming pregnant and advised him to take her to a Native herbalist. Thereafter, the five head of dowry cattle were delivered to the Defendant but the further two head had not been paid. He gave Nofezile this name. He left for work leaving Nofezile at his kraal. She was then two months pregnant with his child which was born during his absence. Whilst he was away he remitted money to her through the Native Recruiting Corporation and others. He specified these remittances. On his return Nofezile was living with Tanase and had a child by him.

The evidence adduced by the Defendant is to the same effect as his plea.

As submitted by Mr. Muggleston in his argument for respondent, the Assistant Native Commissioner gives cogent reasons for his finding that the probabilities favour the Plaintiff's case. The Native Commissioner points out that it is most unlikely that the Plaintiff would have remitted substantial sums of money to Nofezile regularly if she had meant nothing to him as, consonant with custom, would have been the case, if she were not his wife and he had paid damages for having rendered her pregnant and merely mooted a customary union without pursuing it, as alleged by the defence. Here it should be mentioned that the remittances to Nofezile personally through the Native Recruiting Corporation were admitted by the defence. The Native Commissioner also points out that the Defendant's daughter was, as admitted by her, given the name of Nofezile by the Plaintiff, which in accordance with custom, is not done until a woman has entered into a customary union. In addition, as also admitted by her, she made use of the Plaintiff's tax receipts for indentification purposes to obtain payment of the remittances he sent to her through the Native Recruiting Corporation and it is highly improbable that she would have been given his tax receipts, as stated by her, if she had not entered into a customary union with him. Then, as intimated by the Native Commissioner, certain features in the

evidence for Plaintiff give it the impress of truth as they would only have tended unnecessarily to complicate matters if the Plaintiff's case was a fabrication. In the first place, there is the evidence that when the plaintiff's messengers went to negotiate for a customary union between the plaintiff and Nofezile, the Defendant asked them to meet him at Skeyi's kraal to discuss the matter as he did not want Nofezile to know about it because she was in love with Nyangibomvu's son and he feared that she would run away if she heard the negotiations. Secondly, when the Plaintiff and his witness, Joseph Mahlobisa, went to the Defendant at the latter's request so that he could see the Plaintiff, they found the Defendant not at his kraal but at that of the defence witness, Nkonko. Thirdly, that when the Defendant's people, i.e. the *duli* party, brought Nofezile to the Plaintiff they warned him against Nyangibomvu's son as he had *twalaed* Nofezile previously and paid two head of cattle as damages in connection therewith.

There are, as contended by Mr. Knopf, features supporting the Defendant's case, *viz;* (1) the Defence evidence is consistent; (2) the use by the Plaintiff of Nofezile's maiden surname in some of his remittances to her; and, (3) the Defendant's having given Nofezile in a second customary union to a neighbour of the Plaintiff. But these factors are clearly outweighed by the probabilities in the plaintiff's favour set out above.

As also pointed out by Mr. Knopf, there are discrepancies in the evidence for the plaintiff. But, as is manifest from the Native Commissioner's reasons for judgement, he took these discrepancies into account in finding in favour of the Plaintiff's version; and, in my view, he cannot be said to be wrong in that finding as in the light of the probabilities dealt with above the discrepancies in question assume little significance.

The Plaintiff adduced no evidence in support of his averment that the Defendant had received five head of cattle from Moshani as damages for his adultery with Nofezile. But, as contended by Mr. Muggleston, the Plaintiff's claim against the Defendant for such damages is neverthcless competent in Native law in view of the Defendant's admission that he had received eight head of cattle from Moshani as dowry for Nofezile and given her to him in a customary union and as the evidence adduced by the Plaintiff, for the reasons given above, establishes that the Defendant did so during the subsistence of the customary union between the Plaintiff and Nofezile in respect of which the Plaintiff had paid five head of cattle as dowry to the Defendant, see *Xanase's* case (*supra*).

It is true that the decision in *Xanase's* case on the question dealt with in the last preceding paragraph is inconsistent with that in *Mangqashe vs Nkontani,* 4 N.A.C. 61. But the former was approved in *Memani vs. Makaba,* 1 N.A.C. (S.D.) 178, at page 179, and accords with the principles followed in *Hagile vs. Mehlwana,* 5 N.A.C. 16.

It is also true that the decision in Xanase's case, which like the remaining cases cited in the last preceding paragraph and the intant case involve Tembu custom, was based on *Sicefe vs. Nyawozake,* 5 N.A.C. 17, which involved Pondo custom. But, apart from the fact that the greater weight of authority based on Tembu custom supports *Xanase's* case, as is apparent from the cases cited above, it seems to me that the decision in *Xanase's* case in the respect in question ought to be followed here as, with respect, it appears to rest on sounder principles than the decision in *Mangqashe's* case in that it is no more than equitable that the father who received a second dowry for his daughter during the subsistence of her customary union and thereby connived at the resultant adultery, should be mulcted in damages therefor at the instance of the husband subject to the right of the payer of the second dowry, if unaware of the subsisting customary union, to recover such dowry from the father as laid down in *Sicefe's* case. This position of course obtains only during the lifetime of the husband as on his death the widow is free to enter into a second

customary union notwithstanding that the prior one with her late husband has not been dissolved, see *Tobiea vs. Mohatla,* 1 N.A.C. (S.D.) 91, at page 92.

A further point calls for consideration, *viz,* the question of the number of cattle to be deducted from the five head of dowry cattle paid by the Plaintiff to the Defendant for Nofezile, in determining the number returnable to the Plaintiff. Although in his summons the Plaintiff made mention of only two factors affecting such deduction, i.e. his child by Nofezile and the wedding outfit, it is admitted in the Defence evidence that Nofezile had a child by Moshani and in his testimony the Plaintiff stated that a third beast should be deducted for this child. In view of this evidence, the Plaintiff cannot be said to have repudiated this child and as it was born during the subsistence of Nofezile's customary union with the Plaintiff, it is deemed to be a child of this union and, as was conceded by Mr. Muggleston, a beast is deductable in respect thereof, see *Loliwe vs. Mnyuko,* 1945 N.A.C. (C. & O.) 15, at page 16, and *Radoyi vs. Ncetezo,* 2 N.A.C. 174, at page 176.

This deduction does not, as submitted by Mr. Muggleston, affect the costs of appeal as no part of the appeal was based thereon but its object was to attack the whole of the judgment and the reduction is a relatively small one, see *Ntsabalala vs. Piti,* 1956 N.A.C. 111 (S), at page 115 and *Giliomee vs. Cilliers,* 1958 (3) S.A. 97 (A.D.), at pages 100 and 101.

In the result the appeal falls to be dismissed, with costs, but the judgment of the Native Commissioner's Court altered to read "For Plaintiff for five head of cattle or their value, £15 each, and two head of cattle or their value, £10 each, with costs."

Yates and Durno, Members, concurred.

For Appellant: Mr. R. Knopf of Umtata.

For Respondent: Mr. K. Muggleston of Umtata.

SOUTHERN NATIVE APPEAL COURT.

NGWANE *v.* **VAKALISA.**

N.A.C. CASE No. 3 OF 1960.

KINGWILLIAMSTOWN: 29th June, 1960. Before Balk, President, Yates and Young, Members of the Court.

PRACTICE AND PROCEDURE.

Seduction—Specific and general damages payable at common law—factors to be taken into consideration. Maintenance—arrear maintenance payable for child in timeous claims.

Summary: Plaintiff (present Respondent) sued Defendant (now Appellant) in a Native Commissioner's Court for £500 as damages for seduction, plus £5 per month as maintenance for the child born as a result of the seduction from date of birth, *viz.* 15th October, 1957. The Native Commissioner entered judgment for the Plaintiff for £350 damages plus maintenance as claimed. No details of the amount awarded for special damages and that awarded for general damages were given by the Native Commissioner.

The following facts emerged from the uncontroverted evidence for the Plaintiff:—

(1) She was seduced by the Defendant whilst they were both students at a university college.

(2) She obtained a B.A. degree and subsequently took up a teaching post at a salary of £21 16s. 7d. per month.

(3) The Defendant was married at the time of the seduction and this fact was known to the Plaintiff at that time.

(4) Defendant had intercourse with Defendant on two occasions subsequent to the seduction.

(5) Plaintiff's father holds the post of interpreter-clerk in the public service in which he has been for many years.

(6) Plaintiff issued summons in the instant case on the 27th September, 1957.

The appeal to this Court was brought, *inter alia,* on the grounds that:—

(1) The action should have been dismissed in view of the Plaintiff's evidence that she had continued to accept Defendant's favours after she was seduced.

(2) That the Native Commissioner erred in holding Defendant liable for arrear maintenance.

(3) That the amount of damages awarded was excessive.

Held: That the two acts of intercourse between the parties subsequent to the Plaintiff's seduction do not preclude the awarding of damages for seduction.

Held further: That in the circumstances of the instant case an award of £100 as damages for defloration suffices.

Held further: That as the claim was timeous it was competent for the Court to award the arrear maintenance, for a period of a little over a month, claimed for the child.

Cases referred to:

Carelse *vs.* Estate De Vries, 23 S.C. 532.

Kannemayer *vs.* Gloriosa, 1953 (1) S.A. 580 (W.L.D.).

Bekker *vs.* Westenraad, 1942 (W.L.D.) 214.

K. *vs.* v. d. W., 67 P.H., J. 6 (O.P.D.).

Botha *vs.* Peach, 1939 W.L.D. 153 at page 155.

Woodhead *vs.* Woodhead, 1955 (3) S.A. 138 (S.R.).

Oberholzer *vs.* Oberholzer, 1947 (3) S.A. 294 (O.P.D.).

Norton and Others *vs.* Ginsberg, 1953 (4) S.A. 537 (A.D.) at pages 551 and 552.

Els *vs.* Mills, 1926 E.D.L.D. 346, at page 349.

Magwentshu *vs.* Molete 1930 N.A.C. (C. & O.) 40.

Sigournay *vs.* Gillbanks, 1960 (2) S.A. 552 (A.D.) at pages 555 and 556.

Appeal from the judgment of the Native Commissioner at Alice.

Balk (President):

Good cause having been shown, the late noting of the appeal was condoned by this Court.

This appeal is from the judgment of a Native Commissioner's Court awarding the Plaintiff (now Respondent) £350 as damages for her seduction by the Defendant (present Appellant) and £5 per month as maintenance for her child by him as from the 16th August, 1957 i.e. the date of its birth.

The appeal is brought on the following grounds:—

"1. The Native Commissioner as a matter of law should have dismissed the action for damages for seduction on the ground that according to her evidence Respondent continued to accept Appellant's favours after Respondent was seduced.

2. The Native Commissioner erred in law in holding Appellant liable for arrear maintenance in respect of the child born out of the intercourse between the parties.

3. The Native Commissioner erred in law in awarding damages to Respondent in respect of loss of earnings arising out of intercourse between the parties and Respondent's consequent pregnancy.

4. The amount of damages awarded for seduction was in any event excessive."

Mr. Place, in his argument on behalf of the Appellant on the first ground of appeal, submitted that the two acts of intercourse between the parties subsequent to the Plaintiff's seduction by the Defendant debarred her from being awarded damages for the seduction. In making this submission, he relied on *Carelse vs. Estate De Vries,* 23 S.C. 532 and *Kannemayer vs. Gloriosa,* 1953 (1) S.A. 580 (W.L.D.). But, the circumstances in those cases are entirely different from the circumstances in the instant case and do not postulate the existence of a rule of law or legal principle precluding the awarding of damages for seduction when, as here, there had been only two subsequent acts of intercourse. On the contrary, as conceded by Mr. Place, the judgment in *Carelse's* case, at page 539, indicates that there is no such rule or principle as do *Bekker vs. Westenraad,* 1942 (W.L.D.) 214, cited by Mr. Heathcote in his argument for the Respondent, and *K. vs. v. d. W.,* 67 P.H., J. (O.P.D.).

As regards the second ground of appeal, the Plaintiff was awarded maintenance for the child by the Native Commissioner's Court from the date of its birth viz., the 16th August, 1957, until such time as it became of age or self-supporting whichever occurred first. The summons therefor was issued on the 27th September, 1957 so that, as was conceded by Mr. Place, only a little more than one month's arrear maintenance is involved. The Plaintiff was entitled to an order for the child's maintenance as from the date of its birth, see *Botha vs. Peach,* 1939 W.L.D. 153, at page 155, and the award of arrear maintenance of this nature in timeous claims appears to be competent, see *Woodhead vs. Woodhead,* 1955 (3) S.A. 138 (S.R.) in which the case of *Oberholzer vs. Oberholzer,* 1947 (3) S.A. 294 (O.P.D.), relied upon by Mr. Place in his submission that arrear maintenance was not claimable, is distinguished.

Although, as was stressed by Mr. Place in connection with the third ground of appeal, the Native Commissioner found as a fact that the Plaintiff had lost earnings in the sum of £196. 7s. 3d. during the period July, 1957 to March, 1958 as a result of her seduction and pregnancy, he did not in his reasons for judgment include this factor amongst those which he took into consideration in assessing the damages so that a finding that he had in fact done so is not warranted.

It follows that there is no substance in the first three grounds of appeal.

Turning to the remaining ground of appeal, an appeal court will interfere with the discretion of the trial court in the matter of damages where the amount awarded differs substantially from its own estimate of the damages, see *Norton & Others vs. Ginsberg,* 1953 (4) S.A. 537 (A.D.), at pages 551 and 552.

Proceeding to a consideration of the instant case on this basis, the Native Commissioner states in his reasons for judgment that in assessing the damages he took into account the Plaintiff's maintenance and lying-in expenses, including travelling expenses and the cost of a layette, as also that she was an educated woman of a social standard above the average native and holding the post of a teacher. Unfortunately, he does not give details of the amount he awarded for special damages and that awarded by him for general damages.

According to the Plaintiff's uncontroverted evidence, it cost her £10. 16s. for transport to the hospital for her confinement, £1. 10s. for hospital fees and £3 for a layette for the child. She is entitled to recover these expenses, see *Jacobs vs. Lorenzi,* 1942 C.P.D. 394. The Plaintiff further stated that her monthly salary of £21. 16s. 7d. barely covered her cost of living and that she had lost nine months' salary during and subsequent to her pregnancy. She may, therefore, reasonably be allowed under her claim for loss of salary an amount equivalent to three month's salary for her maintenance as part of her lying-in expenses, see *Botha's* and *Bekker's* cases (*supra*), the former at pages 155 and 156 and the latter at pages 230 and 231; see also *Mda vs. Gcanga,* 1957 N.A.C. 50 (S), at page 53, and the authority there cited. The Plaintiff would, therefore, be entitled to a total of £80. 15s. 9d. on the score of lying-in expenses. In addition, she is entitled to damages for defloration. It is manifest from her uncontroverted evidence that she comes of a good family, her father holding a responsible post in the public service in which he has been for many years. She herself is of good social standing holding a University degree and being a qualified teacher. Unfortunately, there is no evidence as to the circumstances in which she was seduced so that it is not possible to form an opinion as to the degree of resistance she offered and the degree of temptation she was exposed to. At the time of the seduction both she and the Defendant were attending university and she was twenty-two to twenty-three years of age. There is no evidence of the Defendant's age at the time. As submitted by Mr. Place, a factor telling against the Plaintiff is that she was aware at the time of her seduction that the Defendant was a married man which should have deterred her. Mr. Place's submission that the fact that the Plaintiff had had intercourse with the Defendant subsequent to the seduction also told against her, does not strike me as sound as the claim for damages flows from the defloration and not from the intercourse subsequent thereto, see *Els vs. Mills,* 1926 E.D.L.D. 346, at page 349.

Mr. Place contended that the damages awarded by the Native Commissioner for the defloration were grossly excessive whereas Mr. Heathcote argued strenuously that they were not. It seems to me that taking all the relevant circumstances of this case into consideration and bearing in mind the previous decisions of this Court, in particular *Magwentshu vs. Molete,* 1930 N.A.C. (C. & O.) 40, and the effect that the present decision might have upon the course of future awards as well as the marked change in the value of money to the extent indicated in *Sigournay vs. Gillbanks,* 1960 (2) S.A. 552 (A.D.), at pages 555 and 556, an amount of £100 for defloration suffices.

In the result the appeal should be allowed, with costs, and the judgment of the Native Commissioner's Court altered to read "For Plaintiff in the sum of £180. 15s. 9d. as damages. In addition the Defendant is ordered to pay to the Plaintiff the sum of £5 per month as maintenance for the child from the 16th August, 1957 until such time as it becomes of age or self-supporting whichever is the sooner. The Plaintiff is awarded costs of suit."

Yates and Young, Members, concurred.

For Appellant: Mr. J. Place of Kingwilliamstown.

For Respondent: Mr. E. Heathcote of Kingwilliamstown

SOUTHERN NATIVE APPEAL COURT.

NGXATA *v.* **NGXATELENI.**

N.A.C. CASE No. 6 OF 1960.

KINGWILLIAMSTOWN: 27th June, 1960. Before Balk, President, Yates and Young, Members of the Court.

NATIVE CUSTOM.

consent of heir or where such consent not obtainable without consent of heir or where such consent not obtainable without consultation with senior relative of heir.

Summary: Claimant (present Appellant) interpleaded for an order declaring certain two head of cattle, which together with other cattle had been attached by the messenger in pursuance of a judgment of a Native Commissioner's Court, to be non-executable. Claimant alleged that the two head of cattle in question had been purchased by her from one Garrett Vesile, who in turn had purchased them from one Teniiwe Nkwane. Tenjiwe, a widow, is the keeper of the kraal and mother of the heir in the estate of her late husband. Her son, Edmund, was therefore the rightful owner of the cattle at the time of the sale. There was nothing in the evidence to indicate that Tenjiwe had obtained her son, Edmund's, consent to the sale of the cattle or that, Edmund being away, she had consulted a senior relative or, failing such relative, a person in authority in the location in regard to the sale.

Held: That the claimant in the circumstances failed to show that Tenjiwe had the right in Native Law to dispose of the cattle belonging to Edmund so as to pass ownership thereof to Garrett Vesile, who could not give her a better title than he had himself so that she (Claimant) failed to make out a *prima facie* case that she had a real right to the cattle.

Cases referred to:

Jones and Buckle's Civil Practice of Magistrates' Courts (Sixth Edition) at pages 204 and 205.

Qolo *v.* Ntshini, 1 N.A.C. (S.D. 234.

Seymour's Native Law at page 131.

Appeal from the judgement of the Acting Additional Native Commissioner at East London.

Balk (President):

This is an appeal by the claimant in an interpleader action from the judgement of a Native Commissioner's Court declaring certain two head of cattle to be executable, with costs.

The grounds of appeal are:—

"1. That the Native Commissioner erred in declaring the cattle executable as it is clearly established that the cattle do not belong to the judgement debtor that the cattle are the property of one Edmund Nkwane on whose behalf his mother sold the cattle.

2. That in the absence of the heir Edmund Nkwane, his mother was forced to sell the cattle owing to number restrictions in Trust Areas and that such sale can only be challenged by the heir and not by a third party.

3. That the judgment is against the weight of the evidence and probabilities of the case."

The Acting Additional Native Commissioner's ruling that the onus of proof rested on the Claimant has not been challenged on appeal so that it stands. Consequently, in order to succeed, the Claimant had to prove that she had a real right to the two head of cattle and not merely to show a lack of title in the judgment debtor, see *Jones and Buckle's Civil Practice of Magistrates' Courts* (Sixth Edition) at pages 204 and 205 and the authorities there cited.

According to the evidence adduced by the claimant, she purchased the cattle from one Garrett Vesile who in turn had purchased them from Tenjiwe whose son, Edmund, was the owner of the cattle. There is nothing in the evidence to indicate that Tenjiwe had obtained her son, Edmund's, consent to the sale of the cattle or that, Edmund being away, she had consulted a senior relative or, failing such relative, a person in authority in the location in regard to the sale. The claimant, therefore, failed to show that Tenjiwe had the right in Native law, the application of which by the Acting Additional Native Commissioner was not challenged on appeal, to dispose of the cattle belonging to Edmund so as to pass ownership thereof to Garrett Vesile, see *Qolo vs. Ntshini*, 1 N.A.C. (S.D.) 234. This also disposes of Mr. Hart's contention on behalf of the Appellant, based on *Seymour's Native Law* at page 131, that the sale by Tenjiwe to Garrett Vesile of the cattle was voidable only at the instance of Edmund and that as the latter had not intervened Vesile obtained a good title to the cattle, the position being that, as already stated, it was not shown that Tenjiwe had the right to pass ownership of the cattle to Vesile. It follows that the Claimant did not show that she was the owner of the cattle as Vesile could not give her a better title to them than he had himself so that the Claimant failed to make out a *prima facie* case that she had a real right to the cattle.

In the circumstances the Native Commissioner cannot be said to be wrong in declaring the cattle to be executable and the appeal, therefore, falls to be dismissed, with costs.

Yates and Young, Members, concurred.

For Appellant: Mr. L. J. C. Hart of East London.

For Respondent: Mr. H. Cohen of East London.

NORTH-EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 10/1960.

ZUNGU *v.* ZUNGU.

ESHOWE: Before Ramsay, President, King and Colenbrander, Members.

PRACTICE AND PROCEDURE.

Cross-appeal from chief's court—procedure for noting—late noting of cross-appeal.

Summary: Defendant during hearing of appeal by Plaintiff from chief's court, intimated that he wished to cross-appeal and had not done so because he was under the impression that his point of view would also be considered during hearing of appeal and that he could also express his dissatisfaction with the chief's judgment. The Native Commissioner reluctantly held that a cross-appeal could not be noted at that stage.

Held: That an appeal, including a cross-appeal, from a chief's court need not necessarily be noted in writing and that no formal or written application for condonation of the late noting of appeal is necessary.

Cases referred to:

Gumede *v.* Nxumalo, 1953, N.A.C., 191.

Appeal from the Court of the Native Commissioner, Mahlabatini.

Ramsay, (President):

In this matter Plaintiff sued Defendant in the Chief's Court for 4 head of cattle and obtained judgment for 3 head. The Chief's judgment included the sentence "Plaintiff lost costs £1. 5s." In his reasons for judgment, however, the Chief wrote:

"Judgment was then entered for Plaintiff for three head of cattle and costs £1. 5s."

Plaintiff appealed to the Court of Native Commissioner against this judgment.

At the commencement of the hearing of the appeal both parties were unrepresented but during the course of the trial Defendant obtained the services of an attorney. Defendant stated he was not satisfied with the chief's judgment but did not appeal as Plaintiff had already noted an appeal and he thought the whole matter would be retried. The Native Commissioner, apparently with regret, notes that the Court is not competent to allow the noting of a cross-appeal at that stage.

In his reasons for judgment he felt that he was bound to confine himself to the terms of Plaintiff's appeal, although the whole of the Chief's jugdment was incorrcct.

The appeal to this Court is based on the following grounds:—

The judgment is against the weight of evidence and is bad in law in that the learned Native Commissioner should not have upheld the Chief's judgment but should have altered, at least to one of Absolution from the instance with costs, despite the fact that the Appellant had not noted a cross-appeal in as much as such a proceeding was unnecessary in an appeal from a Chief's Judgment to the Native Commissioner's Court, as appeal had already been noted.

Further it is respectfully submitted that the judgment relied upon by the learned Native Commissioner, for not having adopted this course is bad in law—

(*a*) as there is no regulation providing for the noting of a cross-appeal in the case of an appeal from a Chief's judgment to a Native Commissioner's Court;

(*b*) that a cross-appeal is unnecessary as all the issues are tried *de novo* by the Native Commissioner's Court.

In regard to the noting of a cross-appeal from a Chief's judgment, the position is set forth in Gumede *v.* Nxumalo, 1953, N.A.C., 191, which decision this Court affirms except where the learned President states that a cross-appeal should be noted in writing in the same manner as an appeal. Rule 9 (1) of the Rules for Chief's Courts lays down that any party may appeal from a Chief's judgment to the Court of the Native Commissioner "by notifying the clerk of the said Court, either in person or through a legal representative." No mention is made of such notification being in writing and this omission was obviously intended to assist illiterate appellants. The preparation of form N.A. 503, Notice of Hearing of Appeal, is the duty of the clerk of court and does not itself constitute a notice of appeal. Thus a notification of appeal may be verbal, but must be made to the clerk of court.

The Native Commissioner could, when he ascertained that Defendant also wished to appeal, have afforded him an opportunity of doing so in terms of Rule 9 (3) of the Rules for Chief's courts. The Rule makes no mention of a formal or written application for condonation of the late noting of an appeal.

Mr. Behrman argued that decisions of this Court in the past were incorrect in regard to the necessity for noting cross-appeals, that an appeal from a Chief's Court throws the whole issue into the melting pot, and that the Native Commissioner must deal with all aspects *de novo*. It follows, he argued, that even if both parties are dissatisfied with a Chief's judgment, there is no provision for and no need for a cross-appeal as both parties are entitled to raise any aspects they may wish to.

This Court is not prepared to reverse its many previous decisions to the effect that an appeal from a Chief's Court must be treated as an appeal and that the regulation requiring it to retry and rehear the case as if it were one of first instance in that Court refer only to procedure and the necessity for obtaining a written record of the case.

In regard to his contention that the rules for Chief's Courts contain no provision for a cross-appeal, it must be pointed out that a cross-appeal is *an appeal*, and that Rule 9 (1) of the rules for Chief's Courts provide that any party dissatisfied with any judgment of a Chief's Court, may appeal.

The appeal is allowed and the Native Commissioner's judgment is set aside. The case is returned to him with the direction that he act in terms of Rules 9 (1) and 9 (3) of the rules for Chief's Courts.

If he should decide to extend the period prescribed for noting the cross-appeal, he should hear any further evidence that either party may wish to adduce in regard to the cross-appeal, hear argument and pass judgment afresh: if he declines to extend the period then the case must return to this Court to deal with the appeal as its stands.

The contradiction between the Chief's recorded judgment and his reasons in regard to costs should receive attention.

The costs of the appeal to this Court will be costs in the cause.

King and Colenbrander, Members, concur.

For Appellant: Mr. F. P. Behrman instructed by Messrs. H. H. Kent.

For Respondent: Mr. W. E. White instructed by Messrs. A. C. Bestall and Uys.

SOUTHERN NATIVE APPEAL COURT.

SKEYI *v.* ZONDEKI.

N.A.C. CASE No. 12 OF 1960.

KINGWILLIAMSTOWN: 28th June, 1960. Before Balk, President, Yates and Young, Members of the Court.

PARTNERSHIP.

Dissolution of partnership—claim by one of partners for reimbursement of portion of partnership liabilities paid by him—date from which right of such action accrues. Costs—where point on which appeal turns not taken in Court below.

Summary: Plaintiff (present Appellant) appealed against the judgment of a Native Commissioner's Court upholding a special plea of prescription and dismissing the summons, with costs, in an action in which the Plaintiff sued the Defendant (now Respondent) for the sum of £251. 2s. 7d. in respect of the latter's share of the partnership liabilities which he (Plaintiff) had liquidated after the dissolution of the partnership. The appeal was brought, *inter alia*, on the ground that the Native Commissioner erred in holding that prescription commenced to run from date of dissolution of the partnership. This point was not raised in the Native Commissioner's Court.

Held: That the Plaintiff's right of action against the Defendant accrued from the date or dates on which he (Plaintiff) paid the partnership liabilities and not from the date on which the partnership was dissolved.

Held further: That as the point on which the appeal turns was not taken in the Court *a quo* there should be no order as to costs of appeal.

Cases referred to:

Wille and Millin's Mercantile Law (Seventh Edition) at pages 253 and 254.

Lamprecht *vs.* Lyttleton Township (Pty.) Ltd., 148 (4) S.A. 526 (T.P.D.).

Preller and Others *vs.* Jordaan, 1956 (1) S.A. 483 (A.D.), at pages 496 and 497.

Appeal from the judgment of the Acting Additional Native Commissioner at East London.

Balk (President):

This is an appeal from the judgment of a Native Commissioner's Court upholding a special plea of prescription and dismissing the summons, with costs, in an action in which the Plaintiff (present Appellant) sued the Defendant (now Respondent) for the sum of £251. 2s. 7d. in respect of the latter's share of the partnership liability which he (Plaintiff), had liquidated after having been called upon to do so.

The appeal is brought on the following grounds:—

"1. That in upholding the Special Plea the learned Native Commissioner erred in law in holding that prescription ensued from 17th February, 1956, the date of Dissolution of Partnership, since on that date Appellant had yet no claim against Respondent.

2. That the learned Native Commissioner misdirected himself in not holding that prescription between the parties only started after Appellant had paid all debts of the partnership and then he claimed half-share from Respondent which date can only be resolved through evidence on the main Plea.

3. That in any event Plaintiff contends that the period of prescription is six years and not three years as the dissolution follows from the written deed of Partnership."

According to the particulars of claim embodied in the summons, as amplified by the further particulars furnished by the Plaintiff, the latter was, after the dissolution of his partnership with the Defendant, called upon by the creditors of the partnership to liquidate the whole of its liabilities amounting to £502. 5s. 2d., the partnership assets having been sold and divided amongst the partners.

By the payment of the £502. 5s. 2d. the Plaintiff became entitled to be re-imbursed by the Defendant to the extent of half that sum i.e. in the sum of £251. 2s. 7d. claimed, see *Wille and Millin's Mercentile Law* (Seventh Edition) at pages 253 and 254.

It follows that, as pointed out by Mr. Hart in his argument on behalf of the Appellant, the Plaintiff's right of action against the Defendant accrued from the date or dates on which he (Plaintiff) paid the partnership liabilities and not from the date on which the partnership was dissolved as held by the Acting Additional Native Commissioner and submitted by Mr. Cohen in his argument for respondent.

Consequently, in terms of section 5 (1) (*d*) of the Prescription Act, 1943, prescription commenced to run from the date or dates of the payment of the £502. 5s. 2d. by the Plaintiff. Those dates are not disclosed in the record so that, as submitted by Mr. Hart, it is not possible to say whether or not the claim is prescribed even assuming, but without deciding, that the period of prescription is that specified in section 3 (2) (*c*) (i) and not that in section 3 (2) (*d*) of the said Act i.e. three years and not six years. Accordingly, the Native Commissioner erred in upholding the special plea of presciption. Here it should be mentioned that *Lamprecht vs. Lyttleton Township (Pty.) Ltd.*, 1948 (4) S.A. 526 (T.P.D.) relied upon by the Native Commissioner and by Mr. Cohen in his argument, differs from the instant case as there a contract of sale formed the basis of the action whereas here the basis of the action is the payment of the partnership liabilities.

According to the record the point on which the appeal turns does not, as pointed out by Mr. Cohen, appear to have been taken in the Court of first instance so that it would be no more than fair that there should be no order as to costs of appeal, see *Preller and Others vs. Jordaan,* 1956 (1) S.A. 483 (A.D.), at pages 496 and 497 and the authorities there cited. In this connection Mr. Hart submitted that the Defendant could have abandoned his judgment and that the Appellant should, therefore, be awarded costs of appeal. It seems to me, however, that the criterion here is not whether the Defendant should have abandoned his judgment but the fact that the Plaintiff did not take the point on which the appeal turns in the Native Commissioner's Court as had he done so, the Native Commissioner might have come to a different decision and the question of the Defendant's abandoning the judgment would not then have arisen, see the authorities cited at the top of page 497 of *Preller's* case (*supra*).

In the result the appeal should be allowed with no order as to costs and the judgment of the Native Commissioner's Court upholding the special plea and dismissing the summons, with costs, should be set aside and the case remitted to that Court for further hearing.

Yates and Young, Members, concurred.

For Appellant: Mr. L. J. C. Hart of East London.

For Respondent: Mr. H. Cohen of East London.

SOUTHERN NATIVE APPEAL COURT.

ZICI *v.* **KOMANI.**

N.A.C. CASE No. 16 OF 1960.

KINGWILLIAMSTOWN: 28th June, 1960. Before Balk, President, Yates and Young, Members of the Court.

LOCATION: BUILDINGS ON SITES REGARDED AS IMMOVABLES.

Sites in Municipal Location— buildings on such sites are regarded as immovables.

Summary: Plaintiff (present Appellant) inherited a hut-site in the East London Municipal Location but as she was a minor at the time, the hut-site was transferred to one Douglas Zici

but it was not endorsed on the relative site permit that the latter held the premises in trust for her as intended. Douglas subsequently sold the premises to the Defendant (now Respondent and the site was thereupon transferred to the latter by the Municipality. Representations were subsequently made on behalf of the Plaintiff to the Municipality which then passed a resolution cancelling the transfer to the Defendant and approving of the registration of the premises in the name of the Plaintiff. The Plaintiff was granted a site permit in terms of this resolution but the Defendant's site permit was not cancelled so that she and the Plaintiff both held site permits in respect of the premises in question.

This action was brought by the Plaintiff for an order declaring her to be the owner of the premises and prohibiting the Defendant from further exercising acts of ownership thereover.

It was argued on behalf of the Appellant that the improvements on the site in question were movables and that the transfer of the site permit from Douglas Zici to the Defendant did not confer on the latter any greater rights than Douglas Zici had and that the Plaintiff being the owner of the improvements, by virtue of the fact that she had inherited them, could vindicate them no matter in whose hands they were.

Held: That the buildings on the site in question are *prima facie* immovables and are, therefore, also owned by the owner of the site, viz. the Municipality.

Cases referred to:

Menzeleleli *vs.* Fex, 1943 N.A.C. (C. & O.) 43 at page 45.

Mkwali *vs.* Mkwali, 1943 N.A.C. (C. & O.) 64.

Sihluku d.a. *vs.* Vanqa d.a., 1957 N.A.C. 166 (S), at page 168.

Tshandu *vs.* City Council of Johannesburg, 1947 (1) S.A. 494 (W.L.D.), at page 496.

Appeal from the judgment of the Acting Additional Native Commissioner at East London.

Balk (President):

This is an appeal from the judgment of a Native Commissioner's Court for Defendant (now Respondent), with costs, in an action in which the Plaintiff (present Appellant) sought an order declaring her to be the owner of certain premises and prohibiting the Defendant from further exercising acts of ownership thereover.

The President, after setting out the pleadings, grounds of appeal and the admitted facts on which the case in the Native Commissioner's Court was decided, proceeds as follows:—

Mr. Cohen's submission in his argument on the merits of the appeal was that the improvements on the site in question were movables, that the Plaintiff became the owner of these improvements by virtue of the fact that she had inherited them, that the site permit issued to Douglas Zici fell to be regarded as being in trust for the Plaintiff as that was the intention, that the transfer of the site permit from Douglas Zici to the Defendant did not confer on the latter any greater rights than Douglas Zici had and that the Plaintiff, being the owner of the improvements, could vindicate them no matter in whose hands they were.

In support of his contention that the improvements, which, according to the site permits put in by consent in the Native Commissioner's Court, consist of eight rooms, were movables, Mr. Cohen relied on *Menzeleleli vs. Fex,* 1943 N.A.C. (C. & O.) 43, at page 45. But, that decision in the respect in question was overruled in *Nkwali vs. Mkwali,* 1943 N.A.C. (C. & O.) 64 where it was held that such improvements are *prima facie* immovables. That decision in *Mkwali's* case was followed in subsequent decisions of this Court, see *Sihluku d.a. vs. Vanqa d.a.,* 1957 N.A.C.

166 (S), at page 168. A similiar view was taken in *Tshandu vs. City Council of Johannesburg,* 1947 (1) S.A. 494 (W.L.D.), at page 496.

It is common cause that the premises in respect of which the declaration of rights is sought are situate in a Municipal location and that the Municipality is the owner of the land forming the premises.

Both from the language of the pleadings as set out above and the Plaintiff's prayer for an order declaring that she is the owner of the premises and prohibiting the Defendant form further exercising acts of ownership thereover, it is manifest that the site i.e., the land, and not merely the dwellings thereon is claimed by the Plaintiff. Here it must be borne in mind that the word "premises" in its popular sense in which it is used in the Plaintiff's prayer includes both the land and buildings thereon, see *Poynton vs. Cran,* 1910 A.D. 205, at pages 218 and 230.

It is also manifest from the wording of the Plaintiff's prayer that the basis of claim is that she is the owner of the premises. As the premises are, as pointed out above, owned by the Municipality, it is not legally competent to accord the Plaintiff the declaration of rights which she seeks based, as it is, on her being the owner of the premises. The position would be the same had the Plaintiff claimed to be the owner only of the buildings on the site, as assumed in Mr. Cohen's argument since, for the reasons given above, these buildings are *prima facie* immovables and are, therefore, also owned by the Municipality. This precludes a finding for the Plaintiff but the Acting Additional Native Commissioner's finding for the Defendant goes further than the prayer contained in her plea in which she asked for the dismissal of the summons which is tantamount to a degree of absolution from the instance, see *Mgijimi vs. Mgijimi and Another,* 1955 N.A.C. 97 (S), at page 101. In any event, it was not legally competent for the Native Commissioner to have found for the Defendant in view of the averment in paragraph 6 of her plea, set out above, that she is the registered owner of the site regard being had to what has been said above. Accordingly, the Native Commissioner's judgment falls to be altered to one of absolution. This alteration is not, however, one of substance but merely one of form since it is clear from what has been stated earlier in this judgment that the plaintiff cannot successfully bring her action again in its present form. It follows that the alteration does not affect the costs of appeal, see *Canca vs. Dabula and Another,* 73 P.H., R. 12 (S.N.A.C.).

In the result the appeal falls to be dismissed, with costs, but the judgment of the Native Commissioner's Court should be altered to one of absolution from the instance, with costs.

Yates and Young, Members, concurred.

For Appellant: Mr. H. Cohen of East London.

For Respondent: Mr. L. J. C. Hart of East London.

CORRIGENDA

NATIVE APPEAL COURT REPORTS 1960 (2).

1. *Page* 34: Delete the whole of existing heading and substitute therefor—

Native estate—Widow cannot dispose of assets of estate without consent of heir or where such consent not obtainable without consultation with senior relative heir.

2. *Case Index:* Delete page numbers 43, 44 and 45 and substitute therefor Roman numerals:—

(i) (ii) and (iii), respectively.

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CORRIGENDA.

1960 (1): Thinta *vs.* Thinta—Page 11. For "owner" where it appears in line 7 read "occupier".

NORTH-EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 28 OF 1960.
NDHLOVO *v.* **KUMALO.**

PIETERMARITZBURG: 20th July, 1960. Before Ramsay, President, King and Cornell, Members of the Court.

Recourse to evidence taken in a previous case which was put in by consent—Mind of Judicial Officer influenced thereby.

Held: It was improper for the Judicial Officer to take cognisance of evidence given in a previous case, put in by consent, and to compare statements therein with evidence heard by him.

Case referred to:

Dhlamini *v.* Ndhlovu, 1954 N.A.C. 185.

Works referred to:

Scoble's "Law of Evidence in South Africa", page 318.

Appeal from the Court of Native Commissioner, Durban. The relative portion of the judgment is given.

Ramsay (President):

The Native Commissioner in his reasons for judgment stated he was impressed by the way in which the Plaintiff's witnesses gave their evidence. but in regard to the Defendant and his two witnesses he writes: "I was not impressed by their evidence which was too glib. While I was listening to them I gained the impression that their version was made up and that they were acting in concert to defeat the Plaintiff's claim. The record of Case No. 886 of 1958, in which the present Defendant was the Plaintiff and the present Plaintiff was the Defendant, was put in by consent and this served to strengthen my conclusion that the Defendant and his witnesses were not telling the truth." The Native Commissioner then proceeds to compare various statements made by defence witnesses in the previous case with those made in the present case.

It was quite improper to refer to and consider evidence in the previous case and in this connection the Judicial Officer's attention is directed to the case of *Dhlamini* v. *Ndhlovu*, 1954 N.A.C.. 185 and particularly to the reference, on page 188, to the Supreme Court case of *Fourie* v. *Morley & Co.*, which sets forth the law on the subject. *Scoble*, page 318, also refers.

While the Native Commissioner does say he disbelieved the Defendant's witnesses. and that the previous record only strengthened that disbelief, it can not be denied that his mind must have been influenced by the discrepancies between that evidence and that given in the present case, to the prejudice of the Defendant.

The appeal is allowed with costs and the judgment of the Native Commissioner is altered to one of absolution from the instance with costs. If the matter is again brought before the Court, it must be tried by a judicial officer other than the one who tried the present case.

For Appellant: Mr. R. B. Brink, instructed by D. B. Brink, Durban.

For Respondent: Mr. O. K. Mofolo, Durban.

NORTH-EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 50 OF 1960.

MTEMBU *v.* **MTEMBU.**

PIETERMARITZBURG: 22nd July, 1960. Before Ramsay, President, King and Cornell, Members of the Court.

PRACTICE AND PROCEDURE.

Action brought in "Court of Bantu Affairs Commissioner"—prior payment of costs of previous abortive action—lack of notice of hearing of appeal.

Summary: On appeal from a Chief's Court, appellant applied for condonation of late appeal by written notice headed "In the Court of the Bantu Affairs Commissioner for the district of Ndwedwe". On objection by respondent's attorney the matter was "struck off the roll". Appellant thereupon brought a fresh application properly directed, which on the objection of the respondent's attorney, was disallowed on the grounds that the costs of the previous application had not been paid, and because the application did not comply with Rule 10 (1) (*c*) of Native Commissioner's Courts.

Held: That if the taxed costs of a previous action have not been paid, the proper course for the Court hearing the same matter again, is to order a stay of proceedings until the costs of the previous action have been paid.

Held: That the issue of a notice of hearing prescribed by Chief's Courts, Rule No. 10 (1) (*c*) is a duty of the clerk of Court and not of an appellant.

Cases referred to:

Ngwenya *v.* Zwane, 1959 N.A.C. 28.

Stephen *v.* Gains and Another, 1914 T.P.D. 622.

Appeal from the Court of the Native Commissioner, Ndwedwe.

Ramsay (President):

In this matter Plaintiff obtained judgment in a Chief's Court on the 5th January, 1959, for damages for the seduction of his daughter by the son of Defendant. On the 27th June, 1959, Defendant filed a written application for extension of the period in which to note an appeal. This notice was headed "In the Bantu Affairs Commissioner's Court for the district of Ndwedwe", and commences "Please take notice that the above-named Defendant will make application to the Bantu Affairs Commissioner . . . ".

The matter came before the Court of the Native Commissioner on the 10th November, 1959.

We have the confusing position today that the old designation of Native Commissioner has been administratively changed to Bantu Affairs Commissioner but the law has not been amended to comply. It follows that only Courts of Native Commissioner still have jurisdiction to try cases between Native and Native.

Here owing to the negligence of the Defendant's attorney, an application was lodged with the Clerk of the Native Commissioner's Court and which was directed to a non-existent court. It was clearly the duty of the Clerk of the Court to have refused to accept that application and to have informed the attorney of his reasons for doing so. Instead, he brought the application to hearing before the Native Commissioner.

At the hearing the attorney for the Plaintiff objected to the application as it was directed to the Court of he Bantu Affairs Commissioner. Mr. Haines, for the Applicant (Defendant), conceded this and applied for an amendment to the application by the deletion of the words " Commissioner for Bantu Affairs " and the substitution of the words " Native Commissioner ". Mr. Ngcobo, for Plaintiff, objected and argued that the Court had no jurisdiction to make the amendment, that there was no application before the Court, that the effect of an amendment would be to make valid what was not valid at the commencement of the hearing, and that the matter was not before the Native Commissioner's Court and so could not be amended.

The Native Commissioner thereupon entered " Appeal struck off the roll with costs ". In fact, there was no question of an appeal before him but merely what purported to be application. If the submission of Mr. Ngcobo, quoted above, is correct " the matter was not before the Native Commissioner's Court " and therefore it would not have been competent for the Native Commissioner to give any kind of judgment, including the order of costs in favour of Mr. Ngcobo's client.

This Court, however, cannot agree with the submissions made. The matter was before the Native Commissioner whom all persons interested knew is also the Bantu Affairs Commissioner, it was obvious that the mistake by Defendant's attorney was inadvertent and the whole matter could have been remedied, and much expense avoided, by the Native Commissioner granting the application for amendment of the application; particularly as the amendment would not affect the subject-matter of the application but merely the title of the Court.

The term " struck off the roll " was erroneous. In *Stephen* v. *Gains & Magistrate, Nylstroom,* 1914 T.P.D. 622, it was held that use of the term by a magistrate did not amount to dismissal or absolution but merely suspended the original notice of set down until Plaintiff again placed the matter on the roll. In the present matter the Native Commissioner should have dismissed the application.

The above remarks are made purely for guidance as the original proceedings are not on appeal.

On the 17th November, 1959, Defendant brought a fresh application for an extension of the period in which to appeal by lodging a written application supported by an affidavit and the matter came before the Court on the 26th January, 1960. The attorney for Plaintiff, after argument, boiled down his reasons for opposing the application to two grounds:—

1. Because costs of the previous abortive application had not been paid.
2. Because the application did not comply with Rule 10 (1) (*c*) of the Rules for Chef's Courts.

The Native Commissioner upheld these grounds and dismissed the application before him.

This was clearly wrong. According to *Jones and Buckle* (Sixth edition) on pages 544-5, if further proceedings are instituted, the Defendant can ask the Court to stay the proceedings, and the Court has a discretion to order a stay until the costs of the previous proceedings have been paid. The decisions quoted are on Magistrates' Courts Rule No. 55 (3) corresponding to Rule 87 (3) of the Native Commissioners' Courts Rules.

The second ground for requesting the application to be dismissed invokes Rule 10 (1) (*c*) of the Rules for Chiefs' Courts.

When the Plaintiff made his first abortive application, the Clerk of the Court completed the form prescribed by Rule 10 (1) (*c*) and it was served on the Defendant requiring him to attend court on the 10th November, 1960, to defend an appeal, for which date the application for condonation was also set down.

There is nothing to say that the form prescribed by Rule 10 (1) (*c*) must be completed by the Clerk of Court when an application for condonation is made—it refers only to an appeal and the Court *a quo* never reached the stage of hearing the appeal. If it had, the proceedings being, in effect, a continuation of the original proceedings in the Native Commissioner's Court the Notice of Hearing dated 3rd August, 1959, would have sufficed, particularly as the fresh application for condonation served to notify the Defendant that the same matter would be coming before the Court, not on the 10th November, 1959, but on the 26th January, 1960. In any case, the duty of preparing and serving the Notice of Hearing devolves, according to Rule 10 (1) (*c*), on the Clerk of Court and not on the litigant. The whole object of the Notice of Hearing is to secure the attendance of the opposing party and inform him of the case he has to meet, In this case the Defendant's attorney *was* present and knew what he had to meet.

The Native Commissioner accordingly erred in dismissing the application on the grounds put forward.

In considering an application for extension of time in which to appeal, the Native Commissioner must, in addition to considering the excuses for the late noting, also have regard to the merits of the case itself and the Appellant's prospects of success. In the present matter the affidavit accompanying the application for condonation alleges that at the time of the seduction, the boy accused was under the age of puberty, being only 12 years and one month old. Further, according to the Chief's written record, the Plaintiff sued the father of the boy alone. Attention is drawn to the first paragraph on page 246 of *Stafford and Franklin* and to the case of *Mbala* v. *Butelezi* 1 N.E. 341, which lay down that a seducer's guardian may not be sued alone but *must* be joined with the actual seducer. Failure to observe this procedure must outweigh any culpability of the Appellant in failing to note his appeal within the prescribed period.

The appeal must succeed with costs. The Native Commissioner's judgment is altered to one granting the application for extension of time in which to appeal, with costs. The hearing of the appeal itself must await payment by Defendant of the taxed costs of the first, abortive application.

For Appellant: Adv. T. G. Juul instructed by D. A. C. Haines & Co.

For Respondent: Mr. R. A. V. Ngcobo of R. A. V. Ngcobo, Durban.

NORTH-EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 30 OF 1960.

MTIYANE *v.* **MTIYANE.**

ESHOWE: 4th August, 1960. Before Ramsay, President; Cornell and Vosloo, Members of the Court.

PRACTICE AND PROCEDURE.

Form of judgment should comply with rules of Court.

Held: That the terms "claim dismissed" "summons dismissed" must not be used to give effect to decisions in which absolution from the instance or judgment for the Defendant are intended.

Rules referred to:

Government Notice No. 2886 of 1951, Rules 54 and 87 (1).
Appeal from the Court of Native Commissioner, Mtunzini.
The relevant portion of the judgment is given.

Ramsay (President):

It is opportune to comment on the practice of some Native Commissioners of erroneously using the term "claim dismissed" or "summons dismissed". Rule 54 of the Rules for Native Commissioners' Courts reads:—

"The Court may, as a result of an action, grant—

(*a*) judgment for the Plaintiff . . .

(*b*) judgment for the Defendant . . .

(*c*) absolution from the instance . . . ".

Nothing is said about dismissing a claim or summons. Dismissing a claim is *not* synonymous with an absolution judgment. A summons is dismissed because of a fault in the summons or service thereof, because a party has no *locus standi* or the Court has no jurisdiction, the claim discloses no cause of action, the Plaintiff is in default or for any flaw which prevents a Court from arriving at a position in which it is able to hear the case and give a judgment in terms of Rule 54.

For Appellant: Mr. H. H. Kent, Eshowe.

For Respondent: Mr. W. E. White, Eshowe.

NORTH-EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 36/60.

VUNDLA *v.* VUNDLA.

ESHOWE: 5th August, 1960. Before Ramsay, President; Cornell and Vosloo, Members of the Court.

NATIVE CUSTOM.

Translation of youngest son of great house to minor house as heir—allocation of lobola of daughters of heirless minor house to youngest son of great house by kraal-head.

Summary: Plaintiff claimed certain livestock paid as lobola for a daughter of the ikohlo house on the grounds that his late father had made a declaration to the family to the effect that Plaintiff, his third son, in the indhlunkulu, should inherit the lobola of the daughters of the heirless ikohlo house. Plaintiff had failed in a previous action in which he claimed that he had been appointed by his late father, the kraal-head, as heir to the ikohlo house. The Defendant is the general heir.

Held: That it is not competent in Zulu law for a kraal-head to declare that his youngest son in the indhlunkulu shall acquire the lobola to be paid for the daughters of the heirless ikohlo house as he has no power to dispose of house property to another house.

Laws referred to:

Government Notice No. 194/1878.
Law 19 of 1891; and
Proclamation 168 of 1932.

Cases referred to:

Malevu *v.* Malevu, 1913 N.H.C. 68.
Heleba *v.* Maxinana, 1921 N.H.C. 52.
Donsamehlo Mbeje *v.* Mahlozini Mbeje, 1927 N.H.C. 27.
Ngetshana Kumalo *v.* Nkitshwa Kumalo, 1932 N.A.C. (T. & N.), 13.
Mbambeni Sitole *v.* Nonsu Sitole, 1938 N.A.C., 35.
Madhludhlu Radebe *v.* Nkulunkutu, 1943 N.A.C., 56.
Vundla *v.* Vundla, 1958 N.A.C., 11.

Appeal from the Court of Native Commissioner, Mtunzini.

Ramsay (President):

This case is a continuation of the proceedings between the same two litigants which came before this Court in 1958, and is reported as case *Vundla* v. *Vundla,* 1958 N.A.C., page 11, in which the Native Commissioner's judgment was altered to one of absolution from the instance. Summons has again been issued on a slightly different cause of action, resulting in a judgment for the Defendant. The history of the case is contained in the report quoted.

In the previous action, in the words of the President of this Court: "Certain evidence was led on behalf of the Plaintiff and thereupon the parties submitted for the Court's decision the question whether in Natal Native law an heir could be provided for an heirless house in such a manner", i.e. by the kraal head nominating the third son of the indhlunkulu as heir in the ikohlo house, in which there were no sons. This Court held in the 1958 case that it is not competent in Zulu law for kraal head who has an heir to place a younger brother of the latter's house as heir into a heirless house.

In the present case the summons, instead of claiming that the Plaintiff's father was translated into the second house as heir, as in the first case, alleges that the kraal head, Mombane, declared that Plaintiff's father should inherit the lobola of all the girls born into the second house both by the original marriage and by a subsequent ngena union.

The Native Commissioner's ruling that this also, was contrary to Zulu law, is now brought on appeal.

This verges very narrowly on *res judicata* but as the point has not been raised, it will not be considered.

Mr. Kent, for the Appellant, has quoted section 37 of the old Code and the case of *Malevu* v. *Malevu,* 1913 N.H.C. 68 in support of his contention that it is legal for a kraal head to allocate the lobola of a girl of the kraal to a younger son, on the assumption that all property in an heirless house devolves on the general heir and may be allocated by him as he may see fit.

Section 37, however, cannot be applied without reference to sections 34 and 38.

The *Malevu* case, however, is distinguished from the present one. There the kraal head had died and the property of the ikohlo house, which had no heir, had already reverted to the general heir and he was accordingly, in terms of section 37 of the 1891 Code, entitled to dispose of that kraal property as he wished. He gave it to his younger son whom he put into the ikohlo house to perpetuate it.

In the present case, however, the kraal head purported to dispose of property of the ikohlo house *before* it became kraal property. A kraal head cannot dispose of house property and while Mombane was alive the ikohlo house property and prospective rights to property vested in that house. Only when Mombane died did that property and those rights become kraal property and so subject to be disposed of by Mombane's heir. Mombane himself had no such right.

In the present case there was another brother, Mali, born after Defendant and before Plaintiff. He does not figure at all in this case, but in the event of the disinherson of Defendant he would be the next in succession in terms of section 34.

The kraal head has no power of devising house property and house property does not become kraal property until the death of a kraal head who has left no heir in the house in question. (*Heleba* v. *Maxinana,* 1921 N.H.C., 52; *Dunsamehlo Mbeje* v. *Mahlozini Mbeje,* 1927 N.H.C., 27; *Ngetsha Kumalo* v. *Nkitshwa Kumalo,* 1932 N.A.C. (T. & N.). 13; *Mbambeni Sitole* v. *Nonsu Sitole,* 1938 N.A.C., 35; *Madhludhlu Radebe* v. *Nkulunkutu,* 1943 N.A.C., 56; *Vundla* v. *Vundla,* 1958 N.A.C., 11). A careful perusal of the provisions of the Zululand Code of 1878 (Government Notice No. 194/1878), does not reveal any authority for the allocation of the property rights in a girl in an heirless house to a son—not the heir in any other house.

The position is thus that as the second house failed to produce an heir, all property rights in the female children of that house passed to the general heir, the Defendant, in the absence of any formal disinherison of him by his predecessor Mombane.

The appeal is dismissed with costs.

For Appellant: Mr. H. H. Kent of H. H. Kent & J. G. Barnes.

For Respondent: Mr. W. E. White of W. E. White.

NORTH-EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 42/1960.

DHLAMINI *v.* **DHLAMINI.**

ESHOWE: 6th August, 1960. Before Ramsay, President; Cornell and Vosloo, Members of the Court.

NATIVE CUSTOM.

Cattle bought by inmate of kraal attached for debt of kraal head—rights of inmate.

Summary: Cattle purchased by an adult unmarried son of a kraal head with whom the son lived, and which cattle were sisa-ed by the son to a third party, were attached in execution for a debt owed by the kraal head. The son (Plaintiff) interpleaded unsuccessfully.

Held: Stock acquired by a major male inmate of a kraal is not executable for the debts of the kraal head.

Laws referred to:

Natal Native Code, Section 1 (3) (*n*).

Cases referred to:

Paul Cili *v.* Mahuza Cili, 1935 N.A.C. 32.

Ngenge Magaga *v.* Mqatane Mhlongo, 1944 N.A.C. (Part IV) 55.

Appeal from Court of Native Commissioner, Empangeni.

Ramsay (President):

The application for condonation, which in itself has no merit, is allowed in view of the principle of law involved and the manifestly incorrect judgment.

All that calls for decision in this case is whether the stock of an unmarried, adult Native male, an inmate of the kraal of a man who has *ngenaed* his mother, is attachable in execution for a judgment debt of that kraal head.

It was contended on behalf of the judgment creditor in this interpleader action that in Native Law the ownership of stock acquired by an inmate of a kraal vests in the head of that kraal and is attachable for the latter's debts. The Native Commissioner considered himself bound to support this view and accordingly declared the cattle in question executable, although he found that the cattle had been bought by the claimant for himself.

The Appellant bases his appeal on the contention that this interpretation of law is incorrect.

In *Paul Cili* v. *Maluza Cili,* 1935 N.A.C. 32 and *Ngenge Magaga* v. *Mqatane Mhlongo,* 1944 N.A.C. (Part IV) 55, it is laid down: "The presumption, until the contrary is proved, is that ownership of all cattle within a kraal vests in the kraalhead. The burden of proof rests on claimant". These are both Natal cases.

In the *Cili* case the Claimant was an actual son of the kraalhead and the Court held that he must prove his ownership. He failed to do so, but the principle was established that he could have owned stock apart from his father, although he was an inmate of the latter's kraal. In the *Ngenge Magaga* case the inmate concerned was a concubine of the kraalhead, yet her right to claim cattle attached for her paramour's debt was upheld.

In view of the two cases discussed and Section 1 (3) (12) of the Code, it is perfectly clear that a major male inmate of a kraal may own property apart from the kraalhead.

The Plaintiff's case is even stronger than those quoted because the cattle were not attached in the possession of the kraalhead but at a kraal where the inmate had *sisaed* them.

The appeal is allowed with costs and the Native Commissioner's judgment is altered to declare the cattle non-executable with costs.

For Appellant: Mr. J. E. Seymour of W. T. Clark and Seymour, Durban.

For Respondent: Mr. F. P. Behrman instructed by Kent and Barnes.

NORTH-EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 38 OF 1960.

ZUNGU *v.* MPUNGOSE.

PIETERMARITZBURG: 14th September, 1960. Before Ramsay, President; King and Ahrens, Members.

PRACTICE AND PROCEDURE.

Operation of Section 30 *of Act No.* 14 *of* 1912—*two differing written judgments.*

Summary: Plaintiff sued, long after the expiry of six months from the alleged incident, a Native constable for assault. The plea denied the assault and specially pleaded the protection of Section 30 of Act No. 14 of 1912. In a written judgment the Judicial Officer based his decision on credibility and probabilities and gave an absolution judgment. Following notice of appeal he furnished additional reasons for judgment and therein gave the deciding factor as prescription in terms of Section 30 of Act No. 14 of 1912. No application made to amend notice of appeal to deal with new issue raised by Judicial Officer in his further reasons for judgment.

Held: That although the judicial officer's action is indefensible, Appellant had the opportunity to amend his notice of appeal to include an appeal against the judicial officer's new finding in his additional reasons for judgment and could not raise the point for the first time in argument.

Statutes referred to:

Act No. 14 of 1912, particularly Section 30.

Ramsay (President):

In this matter in which Plaintiff sued a constable of the South African Police for damages for assault, the Defendant pleaded specially that the cause of action was prescribed by virtue of Section 30 of Act No. 14 of 1912, and generally that the acts of assault alleged by Plaintiff are denied. The Native Commissioner found that Defendant was a constable on duty at the time of the incident that gave rise to the action and that he was thus protected by the provisions of Act No. 14 of 1912, as amended.

As the Native Commissioner so decided, there was no need for him to go any further in his reasons for judgment, but he should, on that finding, have given judgment for Defendant. He proceeds to analyse the evidence and ends up "For the above reasons the Court found that the balance of probabilities were not in Plaintiff's favour and an absolution judgment was accordingly entered with costs".

The Plaintiff has appealed on the grounds that the Native Commissioner erred in finding that Plaintiff failed to prove the allegation made in his summons, and in finding that the probabilities were on Defendant's side. He maintains that the probabilities were on the side of Plaintiff and that the evidence for Defendant was full of contradictions on material points. Plaintiff has *not* appealed against the Native Commissioner's finding that the constable was protected by Act No. 14 of 1912, so all the existing grounds of appeal fall away.

The judicial officer failed in his duty, when requested by letter dated 21st August, 1959, to furnish his written judgment, in that he did not frame his judgment in the form required by Rule 2 (1) of this Court. The written judgment he *did* furnish, dated 26th August, 1959 (not within the 10 days required by law), gave as his reasons for his absolution judgment that he found the probabilities were not in favour of the Plaintiff. The Appellant appealed on that written judgment and the judicial officer then filed reasons for judgment in terms of Rule 9 (1) introducing a completely new fact found to be proved, viz., that Defendant was a constable on duty at the time of the assault and that he was protected by the provisions of Act No. 14 of 1912. This introduced a new element into the judgment in a manner which deprived the Appellant of his right to include an appeal against that point in his notice of appeal.

The judgment of absolution was a competent judgment if the Additional Native Commissioner decided the case on credibility, but if he decided the case on the applicability of Section 30 of Act No. 14 of 1912, it would be incorrect as he would then have had to give judgment for Defendant. This gives rise to a grave suspicion that the judicial officer actually decided the case on credibility and only thought of introducing a finding on Section 30 of Act No. 14 of 1912, after the appeal was noted.

This however, does not assist the Appellant who was at liberty to lodge an application to amend or add to his grounds of appeal and in support thereof to protest against the procedure adopted by the judicial officer.

The appeal is dismissed with costs.

There is no cross-appeal and so the judgment of absolution must stand.

For Appellant: Adv. L. Pape instructed by Cowley & Cowley.
For Respondent: Mr. C. E. Gerber for Deputy State Attorney, Natal.

NORTH-EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 77 OF 1960.

MABASO *v.* **MABASO.**

PIETERMARITZBURG: 15th September, 1960. Before Ramsay, President, King and Watling, Members.

PRACTICE AND PROCEDURE.

Evidence inconsistent with plea—effect.

Summary: Plea not supported by evidence—ground of defence not disclosed by plea—Court's discretion in allowing evidence to diverge from plea.

Held: That while a Court may allow evidence to wander from the plea and arrive at a decision on the evidence, such latitude can not be permitted when the evidence contradicts the plea.

Cases referred to:

Smith and Youngson (Pty.), Ltd. *v.* Dubie Bros., 1959 (2) S.A. 130.

Shill *v.* Milner, 1937 A.D. 101, and the cases reported at the following references: 1920 A.D. 443; 1948 (4) S.A. 466; 1952 (1) S.A. 433; 1958 (3) S A. 605; 1959 (2) S.A. 271.

Legislation referred to:

Rule 45 (3) of Government Notice No. 2886 of 9th November, 1951.

Appeal from the Court of Native Commissioner, Bergville.

Ramsay (President):

The Plaintiff sued Defendant on the following claim:—

1. That the parties hereto are Natives as defined by Act No. 38 of 1927.

2. That Plaintiff's father Paulus Mabaso was married to Plaintiff's mother Maria Jemima Mabaso by Christian Rites on the 21st April, 1931.

3. That Plaintiff is the eldest child from this marriage and the legal heir to the house established by such marriage.

4. That during or about the year 1942, the said Paulus Mabaso gave to his wife, the said Maria Jemima Mabaso, for milking purposes, a black hornless heifer, which then became the property of the house established by her said marriage.

5. That upon the death of the said Paulus Mabaso, Defendant claimed and in spite of Plaintiff's protestations actually took possession of eleven (11) head of cattle, progeny of the said black hornless heifer.

6. That despite demand Defendant refuses to return the said eleven head of cattle to Plaintiff.

Wherefore Plaintiff prays for judgment in his favour for the return of the 11 head of cattle or should the cattle not be available, payment of their value £110.

Defendant's plea reads:—

1. Defendant denies that Plaintiff is entitled to the said cattle or any cattle as alleged by Plaintiff.

2. Defendant states that as heir to the late Paulus Mabaso he is entitled to the heifer and its increase.

3. Defendant states that in any event the said heifer was slaughtered by Defendant's father prior to his death and at that time the increase was 1 tolley and 2 heifers.

4. Defendant states that at a public ceremony before the Native Commissioner the Estate of the late Paulus Mabaso was wound up and Plaintiff accepted the three head of cattle which Defendant gave him in addition to an amount of £100 which the late Paulus Mabaso had stated should be given to Plaintiff.

5. Plaintiff accepted these cattle in full settlement of all claims he had against Defendant.

This is a deplorable plea which ignores the form prescribed by Rule 44 (3) of Government Notice No. 2886 of 1951, and reflects very poorly on the firm of attorneys responsible for it. A distinguished judge once observed (quoted in *Smith and Youngson (Pty.), Limited* v. *Dubie Bros,* 1959 (2) S.A. 130, at 135):—

> "The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them, but if an Appellate Court is to treat reliance on them as pedantry or mere formalism, I do not see what part they have to play in our trial system."

The Native Commissioner gave judgment for Plaintiff as claimed and Defendant now appeals against the whole of the judgment of the learned Native Commissioner at Bergville delivered on the 19th July, 1960, as being bad in law in that he erred in law in holding that Defendant's plea did not refute each and every allegation contained in Plaintiff's summons and in particular that Defendant's plea did not refute the allegations contained in paragraph 4 of Plaintiff's summons.

Plaintiff's claim alleges that Plaintiff's father Paulus was married by Christian rites to his mother Maria and Plaintiff is the heir of this marriage.

This is not disputed in the plea.

The summons alleges that about 1942, the said Paulus (subsequently amended to read Mdaweni, Plaintiff's uncle) gave Maria a "milk beast" which then became the property of her house.

This is not disputed in the plea.

The summons claims that after Paulus's death Defendant took possession of 11 head of cattle being the progeny of the said "milk beast" and that he refuses to return them.

This is not disputed in the plea.

Rule 45 (3) reads "The Defendant in his plea shall either admit or deny or confess and avoid all the material facts alleged in the particulars to the summons and shall clearly and concisely state the nature of his defence and all the material facts on which it is based.".

Defendant's plea, however, denies that Plaintiff is entitled to the cattle claimed but does not state the reason for this assertion. He claims to be heir to the late Paulus without denying or amplifying Plaintiff's claim to be heir. He states that by virtue of being heir he is entitled to the original beast whose progeny Plaintiff claims, i.e. a milk beast given to Maria. He pleads that at a settlement of Paulus's affairs Plaintiff accepted three cattle in full settlement of all claims he had against Defendant.

The plea before us does not deny any of Plaintiff's allegations except that Defendant merely denies that Plaintiff is entitled to the cattle claimed.

The evidence discloses that Defendant is the heir of a customary union which was in existence when Paulus married Maria, and also the general heir.

Paragraph 5 of the plea alleges that Plaintiff accepted three head of cattle in full settlement of all claims Plaintiff may have had against Defendant.

Let us examine the evidence in support of this portion of the plea. The onus, of course, is on the Defendant. Defendant states that at a family meeting Plaintiff asked him for a beast. He states "I gave Plaintiff three head of cattle as he had requested. He was satisfied and thanked me very much"; "Plaintiff did say he agreed to accept the three head of cattle". Defence witness Matafeni Tshabalala states "Defendant said to Plaintiff I give you two head of cattle because you worked for my father on the farm for three years. Plaintiff was not satisfied and Mxabuza suggested that Plaintiff (obviously incorrectly recorded: it should read Defendant) give him three head of cattle, one for each year he had worked. Plaintiff accepted these cattle". That is all the evidence that the Defendant adduces in support of his plea that Plaintiff accepted three cattle in full settlement of all claims he had against Defendant. Defendant quite clearly has not discharged the onus which rested on him.

Mr. Talbot for the Appellant referred to the following cases in support of an argument that a plea need not necessarily be adhered to if the full cause at issue is disclosed in the evidence:

> 1920 A.D., 443; 1937 A.D., 101 at 105; 1948 (4) S.A. 466 at 471; 1952 (1) S.A. 443 (A.D.) at 488 (*g*); 1958 (3) S.A. 605 at 606 (*c*); 1959 (2) S.A. 135 (*c*); 1959 (2) S.A. 271 (A.D.) at 277 (*g*).

The point he wished to bring forth is well stated in *Shill* v. *Milner*, 1937 A.D. at page 105. It reads as follows:—

> ". . Mr. R's argument consists largely of an examination of the *ipsissima verba* of the pleadings. While listening to him, however, I could not but ask myself what the substantial issue was between the parties in the Court below.

> The importance of pleadings should not be unduly magnified. The object of pleadings is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full inquiry. But within those limits the Court has wide discretion for pleadings are made for the Court, not the Court for pleadings. Where a party has had every facility to place all the facts before the trial court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal merely because the pleadings of the opponent has not been as explicit as it might have been."

These cases quoted are, however, distinguished from the one under consideration in that they contained proper pleas, but during the course of the trial the essence of the case drifted away from the formal pleadings and new subject matter was brought up the evidence which, in each case, the Court allowed for the reasons quoted above. That does not apply in the present case where the evidence for the Defendant and the cross-examination of the Plaintiff's witnesses does not in any way conform to the plea, however liberally it may be interpreted and where such evidence contradicts the plea. It cannot be held that the plea is merely "not as explicit as it might have been".

The notice of appeal also adds to the difficulties of the case as it merely deals with the Native Commissioner's finding in regard to the plea. The Native Commissioner in his reasons criticises the plea and finds that the Defendant's evidence was totally at variance with his defence as set out in paragraphs (4) and (5) of the plea. He also, however, analyses the evidence on the merits of the case. The notice of appeal makes no mention of this analysis nor attacks the Native Commissioner's conclusions thereon.

The evidence discloses the whole matter at issue but whatever indulgence may be allowed by this Court, the appeal cannot succeed. One aspect is that dealt with, that while a Court may allow the evidence to wander from the plea and arrive at a decision based on the evidence, such latitude cannot be permitted when the evidence contradicts the plea.

A second aspect is that all the evidence is before the Court which could have been adduced had the plea been properly and pertinently framed. Assuming further that had the notice of appeal been framed to embrace all the points arising from the evidence, the Court would nevertheless have had to decide against the Defendant. All cattle at a kraal on the death of a kraal head are presumed to be the property of that house and a heavy onus rests on any claimant to show that they do not so belong. In this case it is common cause that the cattle claimed were at Plaintiff's kraal and the evidence could not possibly support a finding that Defendant has discharged the onus of proving that they are his.

The appeal is dismissed with costs.

For Appellant: Adv. J. B. Talbot, instructed by Macaulay and Riddell.

For Respondent: Adv. W. O. H. Menge, instructed by Hellet and De Waal.

SOUTHERN NATIVE APPEAL COURT.

GALELA *v.* MGUQULWA.

N.A.C. CASE No. 8 OF 1960.

UMTATA: 27th September, 1960. Before Balk, President, Yates and Harvey, Members of the Court.

PRACTICE AND PROCEDURE.

Notice of Appeal—grounds of appeal not covering points on which appeal turns.

Summary: The facts appear from this Court's judgment.

Held: That as the 1st and 2nd grounds of appeal were not apposite and the remaining ground invalid, the appeal should be dismissed with costs.

Cases referred to:

Korsten African Rate-payers Association *vs.* Pitana 1955 N.A.C. 136 (S), page 138.

Mngcangcani *vs.* Mdlangisa 1959 N.A.C. 34 (S), page 36.

Appeal from the judgment of the Native Commissioner at Flagstaff.

Balk (President):

This is an appeal from the judgment of a Native Commissioner's Court allowing an appeal by the Defendant against the judgment of a Chief's Civil Court and altering the Chief's judgment from one ordering the Defendant to release the six pigs claimed by the Plaintiff to a decree of absolution from the instance, with costs.

The onus of proof on the pleadings rested on the Plaintiff.

The appeal to this Court is brought by the Plaintiff on the following grounds:—

> "(*a*) That the judgment was against the weight of the evidence and probabilities, and on the evidence and Chief's reasons for judgment, judgment should have been for Plaintiff.
>
> (*b*) (1) That the judgment is bad in law in that according to the Chief's reasons for judgment the Defendant in the Chief's Court admitted Plaintiff's claim but wanted APPORTIONMENT before releasing the pigs.
>
> (2) That the judgment is further bad in law in that the Court erred in giving judgment without hearing the Defendant for cross-examination, *inter alia*."

The appeal from the Chief's judgment was allowed by the Native Commissioner's Court and that judgment altered to one of absolution at the instance of the Defendant's attorney at the close of the Plaintiff's case without the Defendant's having led evidence or closed his case, so that the test to be applied here is whether there is evidence upon which reasonable man *might* find for Plaintiff and not whether he *ought* to do so; in other words whether the Plaintiff made out a *prima facie* case, see *Korsten African Ratepayers Association* vs. *Pitana,* 1955 N.A.C. 136 (S), at page 138.

The first ground of the appeal to this Court is not apposite as it postulates a trial in which both parties closed their cases which is not the position here.

There is no substance in the next ground of appeal as there is no mention in the Chief's reasons for judgment of an admission by the Defendant of the Plaintiff's claim nor of any apportionment.

The remaining ground of appeal is incomprehensible and, therefore, invalid in terms of Rule 7 (*b*) of the Rules of the Court which requires the grounds of appeal to be clearly and specifically stated, see *Mngcangceni* vs. *Ndlangisa,* 1959 N.A.C. 34 (S), at page 36.

It follows that the point on which the appeal to this Court turns, is not covered by the grounds of appeal and as, in terms of Rule 16 of the Rules of this Court, an Appellant is limited to such grounds, the appeal to this Court should be dismissed, with costs.

I feel constrained to add that this case emphasises the necessity for drawing up proper grounds of appeal part cularly as the result may well have been different here had this been done.

Yates and Harvey, Members, concurred.

For Appellant: Mr. R. Kropf of Umtata.

For Respondent: Mr. K. Muggleston of Umtata.

SOUTHERN NATIVE APPEAL COURT.

MLIZWA *v.* **KHWINTSI.**

N.A.C. CASE No. 21 OF 1960.

UMTATA: 28th September, 1960. Before Balk, President, Yates and Harvey, Members of the Court.

NATIVE CUSTOM.

Inheritance—Heirship to illegitimate male where balance of fine for seduction and pregnancy of his mother resulting in his birth and isondlo beast tendered after his death and after the death of his only male descendant.

Summary: The following facts are common cause:—

(*a*) The Plaintiff (now Respondent) is the heir of the late Nohani.

(*b*) The Defendant (present Appellant) is the heir of the late Duka.

(*c*) The late Duka seduced and rendered pregnant Nohani's daughter Hlanziswa, and the late Mxhelo was born of this union.

(*d*) Mxhelo had two daughters but his only son, Pakamile, died leaving no male issue.

Plaintiff sued the Defendant for certain property left by the late Mxhelo and sought a declaration of rights, that as heir he (Plaintiff) was entitled to the dowries and any other payment made or to be made in respect of Mxhelo's two daughters.

The Defendant in his plea in the Chief's Court averred that only portion of the damages in respect of Hlanziswa's seduction and pregnancy had been paid up to the time of Pakamile's death. It also emerged from the evidence for Defendant that after the service of the summons in the instant case on him he tendered the balance of the *fine* and the *isondla* beast to Plaintiff.

Held: That an illegitimate male belongs to his mother's family when the full *fine* in respect of her seduction and pregnancy resulting in his birth and the *isondla* beast have not been paid and the tendering of the balance of such *fine* and the *isondla* beast after the death of the illegitimate male and his only male descendant does not have the effect of making the illegitimate male a member of his natural father's family and the heirship to him is determined accordingly.

Cases referred to:

Mkanzela *vs.* Rona, 1 N.A.C. (S.D.) 219, page 221.
Mbese *vs.* Lumanyo, 1957 N.A.C. 25 (S), page 27.
Zaduka *vs.* Sontsele, 1954 N.A.C. 169 (S).
Mpeti *vs.* Nkumanda, 2 N.A.C. 43, page 44.
Paponi *vs.* Mpakati, 3 N.A.C. 241, page 242

Appeal from the judgment of the Native Commissioner at Lusikisiki.

Balk (President):

This case had its inception in a Chief's Civil Court in which the Plaintiff (now Respondent) sued the Defendant (present Appellant) for certain property left by the late Mxhelo and sought a declaration of rights that, as heir, he (Plaintiff) was entitled to the dowries and any other payment made or to be made in respect of two girls, viz., Zulani and Nozikwantu.

It is common cause that—

(1) the Plaintiff is the heir of the late Nohani;
(2) the Defendant is the heir of the late Duka;
(3) Mxhelo was born to Nohani's daughter, Hlanziswa, as a result of her having been seduced and rendered pregnant by Duka;
(4) the girls Zulani and Nozikwantu are Mxhelo's legitimate children;
(5) after Mxhelo's death, his only son, Pakamile, died leaving no male issue.

The issue in dispute is whether or not damages were paid in respect of Hlanziswa's seduction and pregnancy. The Plaintiff averred in his summons in the Chief's Court that no such damages had been paid whereas the Defendant stated in his plea in that Court that a beast and eight goats had been paid on account of these damages leaving one beast still owing on that score and that the *isondlo* beast was also still due. The Defendant also stated in his plea that to his knowledge the only property left by the late Mxhelo was as listed therein. This list differs from the one of the property in question contained in the summons.

The Chief's Court entered judgment for the Defendant with costs, subject to payment by him to the Plaintiff of four head of cattle, i.e. three head in respect of the balance of the damages referred to above and the fourth as an *isondlo* beast, holding that it was fairer to apply the presently recognised scale of damages for seduction and pregnancy viz., five head of cattle, than that of three head obtaining in former years.

The appeal from the judgment to the Native Commissioner's Court brought by the Plaintiff was allowed, with costs, and that judgment was altered in effect to one for Plaintiff as prayed, with costs, except that the late Mxhelo's property awarded to the Plaintiff is as listed in the Defendant's plea consonant with an agreement between the parties during the hearing that that list was the correct one.

The appeal to this Court is brought on the ground that the judgment is against the weight of the evidence, the general probabilities of the case and the facts found proved.

It is manifest from the Native Commissioner's reasons for judgment that he misconceived the issue involved as he found for the Plaintiff on the ground that there was no customary union between Duka and Hlanziswa whereas the disputed issue, as indicated above, is whether or not damages were paid for Duka's having seduced and rendered Hlanziswa pregnant, it being implicit in the pleadings and the evidence in the Native Commissioner's Court that a customary union between them had not

taken place. If the damages were paid in full plus an *isondlo* beast, Mxhelo would thereby have been "acquired" by Duka and would have become a member of the latter's family so that the Defendant, as the late Duka's heir, would also have been the late Mxhelo's heir in the absence of surviving male issue of Mxhelo. On the other hand, if the full damages and *isondlo* were not paid, Mxhelo would have belonged to the family of his mother's father, i.e., to the late Nohani's family, and the Plaintiff, as the late Nohani's heir, would also have been the heir to the late Mxhelo, see *Mkanzela* vs. *Rona,* 1 N.A.C. (S.D.) 219, at page 221, and *Mbese* vs. *Lumanyo,* 1957 N.A.C. 25 (S), at page 27.

It seems to me that the evidence of the Defendant's witness, Jele, in the Native Commissioner's Court that a young black bull and eight goats had been paid by Duka to Nohani's eldest son, Ngqaza, prior to Mxhelo's birth as part of the damage for Hlanziswa's seduction and pregnancy leaving a balance of one beast still owing on that score, falls to be preferred to the evidence for the Plaintiff that no such damages were paid, for, had the defence resorted to fabrication, one would have expected it to have claimed that the full and not only part of the damages had been paid. Be that as it may, it seems clear that the Defendant cannot in any event succeed, as contended by Mr. Airey in his argument on behalf of the Respondent, as only portion of the damages were paid up to the time of Pakamile's death so that the latter, on his death, belonged to the family of the mother of his late father, Mxhelo, i.e. the family of the late Nohani, see *Mkanzela's* case (*supra*); and, in accordance with Native Law and Custom, on Pakamile's death, his property there and then devolved on, and the dominium therein passed automatically to the heir of that family, i.e. to the Plaintiff, see *Zaduka* vs. *Sontsele,* 1954 N.A.C. 169 (S).

It is true that it is stated in *Mpeti* vs. *Nkumanda,* 2 N.A.C. 43, at page 44, that damages of the nature here in question may be paid at any time and that it emerges from the Defendant's evidence under cross-examination and that of his witness, Jele, that after the issue of the summons in the instant case in the Chief's Court but before its trial in that Court, the Defendant offered to pay two head of cattle to the Plaintiff, i.e. one beast in settlement of the balance due in respect of the damages and the other in respect of *isondlo,* and that the Plaintiff refused this offer. But this offer does not assist the Defendant as it is clear from the evidence that it was made after both Mxhelo and Pakamile had died and, viewed in its proper perspective, the statement in *Mpeti's* case that the damages may be paid at any time, falls to be construed as meaning at least at any time before the death of the illegitimate child concerned or of the latter's male descendants, if any, whichever may be the later, as otherwise it would, for the reasons given above, result in the deprivation of the heir, in this case the Plaintiff, of his vested inheritance. This view accords with that expressed in *Paponi* vs. *Mpakati,* 3 N.A.C. 241, at page 242. Similar considerations apply in determining the property rights in Zulani and Nozikwantu.

In the result the appeal should be dismissed, with costs.

Yates and Harvey, Members, concurred.

For Appellant: Mr. R. Knopf of Umtata.

For Respondent: Mr. F. G. Airey of Umtata.

SOUTHERN NATIVE APPEAL COURT.

MBANGI *v.* KUNYALELE.

N.A.C. CASE No. 25 OF 1960.

UMTATA: 4th October, 1960. Before Balk, President, Yates and Collen, Members of the Court.

NATIVE CUSTOM.

Calabash Custom obtaining in Elliotdale District.

The following is an excerpt from the judgment of the President dealing with the *calabash* custom as it obtains in the Elliotdale District, the remainder of the judgment not being material to this report:—

> Mr. Knopf also submitted that the Plaintiff would be entitled to a further eleven head of cattle if the "*calabash custom*" relied upon by the Defendant to substantiate his claim to them, was found by this Court not to have been established. The Assessors called by the Native Commissioner stated that under this custom, as it obtains in the Elliotdale District where the parties reside, cattle are given from the dowry of a giri to her mother and on the mother's death such cattle are inherited by her second eldest son. This opinion finds support from the fact that the same custom obtains amongst the neighbouring Gcalekas in the Willowvale District, see *Mkwenkwana* vs. *Tevise,* 3 N.A.C. 35, so that the existence of this custom was properly accepted by the Native Commissioner. Admittedly, as pointed out by Mr. Knopf, the custom amongst the Pondos differs in that the cattle are heritable not by the mother's eldest son but by her youngest son, see *Dingizweni* vs. *Ndabambi,* 1 N.A.C. 126, at page 127, and *Myendika* vs. *Sidekwana,* 2 N.A.C. 6, but in the circumstances set out above this affords no criterion.
>
> It follows that the Defendant's claim to the eleven head of cattle based, as it is, on the *calabash* custom and his being the second eldest son, was substantiated.

Yates and Collen, Members, concurred.

Cases referred to:

Mkwenkwana *vs.* Tevise, 3 N.A.C. 35.
Dingizweni *vs.* Ndabambi, 1 N.A.C. 126, page 127.
Myendika *vs.* Sidekwana, 2 N.A.C. 6.

SOUTHERN NATIVE APPEAL COURT.

MEHLOMLUNGU *v.* GUMASHOLO.

N.A.C. CASE No. 31 OF 1960.

UMTATA: 4th October, 1960. Before Balk, President, Yates and Collen, Members of the Court.

NATIVE CUSTOM.

Lobolo—Customary right to refund of dowry provided by father or elder brother not transmitted to heir of provider even where former was not able to exercise such right during his lifetime.

Summary: It is common cause that the Plaintiff's (present Appellant) late father advanced the dowry for Defendant's (now Respondent's) wife. Defendant being the brother of Plaintiff's late father. At the time of Plaintiff's father's death, Defendant's elder daughter had not as yet been given in marriage so that the former had not been able to exercise his right to a refund from that source of the dowry advanced by him.

> On the marriage of Defendant's daughter the Plaintiff sued the Defendant for a refund of the dowry advanced by his late father, maintaining that as his father's heir he was entitled to such refund.

There is nothing in the pleadings and evidence to indicate that the Defendant undertook to refund the dowry advanced to the Plaintiff.

The Court *a quo* entered judgment for Defendant holding that the right to refund lapsed on the death of the dowry-provider and the appeal was brought against this finding.

Held: That the dowry-provider's right to a refund of the dowry is personal to him and is, therefore, not transmitted to his heir where there is nothing to show that there was any undertaking by the recipient of the dowry to make such refund to the heir.

Cases referred to:

Qasekonva *vs.* Msuzo, 6 N.A.C. 7.

Tanana *vs.* Tanana, 1947, N.A.C. (C. & O.) 25.

Nzima *vs.* Hlahleni, 1 N.A.C. 35.

Whitfield's S.A. Native Law (First Edition).

Appeal from the judgment of the Additional Native Commissioner at Umtata.

Balk (President):

This is an appeal from the judgment of a Native Commissioner's Court for Defendant (now Respondent), with costs, in an action in which the Plaintiff (present Appellant) claimed from him seven head of cattle or their value, £70, as a refund of the dowry paid by his (Plaintiff's) late fater for the defendant's wife on condition that this refund would be made from the dowry of the Defendant's eldest daughter on her marriage, such marriage having taken place and ten head of cattle having been paid as dowry in respect thereof.

The appeal is brought on the ground that "the judgment is bad in law in that the Judicial Officer erred in holding in the circumstances of this particular case where the dowry payer died before he could enforce his rights to repayment, that the right to repayment lapsed on his death and that such finding is against Native Law and Custom".

The Additional Native Commissioner's findings on fact have not been challenged on appeal so that they fall to be accepted.

The Additional Native Commissioner found, *inter alia,* that seven head of cattle were paid by the Plaintiff's late father (hereinafter referred to as "the deceased") as dowry for the defendant's wife, that the deceased and the defendant were brothers, that the deceased was the Defendant's kraalhead at the time he provided the dowry of seven head of cattle for the Defendant's wife, that the Defendant's eldest daughter had married and that the Defendant had received nine head of cattle as dowry for her. The Native Commissioner also found that it had not been proved that the Defendant had agreed to make the refund claimed.

It is implicit in the evidence that the deceased was already dead when the Defendant received the nine head of cattle as dowry for his daughter and there is nothing in the pleadings or evidence to indicate that the Defendant undertook to make the refund in question to the Plaintiff.

The appeal turns on the question whether the Native Commissioner erred in holding, on the authority of *Qasekonya* vs. *Msuzo,* 6 N.A.C. 7 and *Tanana* vs. *Tanana,* 1947, N.A.C. (C. & O.) 25, that the right to claim a refund of the seven head of cattle provided by the deceased as dowry for the defendant's wife lapsed on the deceased's death and did not pass to the latter's heir i.e. to the Plaintiff, in the absence of an undertaking by the Defendant to repay these cattle to the Plaintiff.

In his able argument for the Appellant, Mr. Airey relied in the main on *Nzima* vs. *Hlahleni,* 1 N.A.C. 35, which is on all fours with the instant case. But in that case the question whether the heir of the dowry-provider was entitled to a refund of the dowry was not specifically gone into so that the judgment affords no real assistance here.

Mr. Airey also contended strenuously that it was implicit in the concluding paragraph of the judgment in *Tanana's* case (*supra*) that there the dowry for the daughter was received before the death of the dowry-provider whereas in the instant case the dowry for the daughter had been received after the death of the dowry-provider so that the latter could not exercise his right to claim the refund from the daughter's dowry and this right was accordingly transmitted to his son, the Plaintiff, who was thus entitled to claim the refund. But, apart from the fact that the second paragraph of the judgment in *Tanana's* case suggests that the dowry for the daughter was received after the dowry-provider's death, Mr. Airey's argument loses sight of the principle underlying the decision in *Qasekonya's* case and in *Tanana's* case that the heir of the dowry-provider is not entitled to claim a refund of the dowry, viz., that the right to do so is personal to the dowry-provider and is, therefore, not transmitted to the latter's heir, see *Whitfield's S.A. Native Law* (First Edition) at pages 391 and 392. The same applies to Mr. Airey's submission that *Qasekonya's* case falls to be distinguished from the present one as there dowry had been provided by the father of the Defendant not only for the latter but also for the latter's elder brother who was the heir's father, which is not the case here.

The Tembu Assessors were consulted in the instant case but, whilst they agreed that the dowry was not refundable in the circumstances obtaining here, the reasons given by them for this opinion, viz., that a claim for a refund of the dowry could not be enforced by the dowry-provider in the absence of a specific agreement between the parties concerned to make such a refund and that the heir could have no better right than the deceased, is untenable. That this reason is untenable is manifest from a series of Native Appeal Court decisions that the right to a refund of the dowry in cases of the nature in question is not contingent upon an agreement but flows from the operation of Native Law and Custom, see *Mnxaku* vs. *Madolo,* 3 N.A.C. 67, *Madolo* vs. *Mjonono,* 3 N.A.C. 68, at page 69, *Mzileni* vs. *Mzileni,* 5 N.A.C. 39, at page 40, and the concluding paragraph of the judgment in *Qasekonya's* case (*supra*).

Since, as pointed out above, the principle underlying the decision in *Qasekonya's* case and *Tanana's* case, is that the dowry-provider's right to a refund of the dowry is personal to him and is, therefore, not transmitted to his heir, the Native Commissioner rightly found in the instant case, on the authority of those cases, that, as it had not been shown that the Defendant agreed to refund the dowry to the Plaintiff, the latter could not succeed in his claim.

The appeal should, accordingly, be dismissed with costs.

Yates and Collen, Members, concurred.

For Appellant: Mr. F. G. Airey of Umtata.

For Respondent: Mr. H. White of Umtata.

NORTH-EASTERN NATIVE APPEAL COURT.

DHLAMINI *v.* MABUZA.

N.A.C. CASE No. 68 OF 1960.

PRETORIA: 5th October, 1960. Before Ramsay, President; King and Potgieter, Members of the Court.

MAINTENANCE.

Maintenance of illegitimate children under Common Law—liability of natural father.

Summary: Unmarried mother sued the natural father of her illegitimate children for maintenance. Defendant pleaded that Plaintiff has no *locus standi in judicio* and that he is absolved as he has paid the customary damages for seduction to Plaintiff's father. Case tried under Common Law.

Held: That under Common Law an unmarried Native female has the right to claim maintenance from the father of her children.

Cases referred to:

Tsautsi *v.* Nene & Another, 1952 N.A.C., 73.

Rex *v.* Rantsoane, 1952 (3) S.A., 281.

Authorities referred to:

Transvaal Ordinance, No. 44 of 1903, Section 3 (1).

Maasdorp (iv), 1934.

Nathan III, 1680 (latest editions).

Appeal from Court of Native Commissioner, Ermelo.

Ramsay (President):

Plaintiff, an unmarried woman, presumably a major, sued Defendant for maintenance of her two illegitimate children of which Defendant is the admitted father.

Defendant pleaded that Plaintiff has no *locus standi in judicio* and that Defendant has discharged his liability for maintenance by paying to Plaintiff's guardian, according to Native Law, the customary damages for seduction.

The Native Commissioner applied Common Law and gave judgment for Defendant but as his judgment was not based on Defendant's plea, he made no order as to costs.

Plaintiff appeals on the grounds—

(*a*) that the judgment is bad in law;

(*b*) that the Native Commissioner erred in finding that, although the Defendant is legally liable to maintain the children of Plaintiff of which he is the father, he is absolved from maintaining them by reason of the fact that they are supported by their maternal grandfather and are not destitute;

(*c*) that the Native Commissioner erred in basing his judgment on a ground which was not pleaded by the Defendant, thereby allowing him a defence which had not raised.

To deal first with paragraph (*c*) of the notice of appeal, in addition to the Native Commissioner's satisfactory explanation in this respect, the Court's power to raise a defence *mero motu* is not confined to questions of jurisdiction. It may of its own motion raise any legal exception or objection if it is the public interest or in the interest of justice to do so. (*Tsautsi* v. *Nene and Another,* 1952 N.A.C., 73.)

In regard to paragraph (*b*) of the notice of appeal, it would appear that the Native Commissioner in coming to his decision was influenced by the decision, quoted by him in *Rex* v. *Rantsoane,* 1952 (3) S.A., 281. This decision in a criminal case followed proceedings in a Native Commissioner's Court under the provisions of Transvaal Ordinance, No. 44 of 1903, sub-section (3) (1) which permits of a maintenance order only if the child is without means of support and the father is able to maintain

or contribute towards its maintenance. There are no such restrictions in the Common Law [see Maasdorp (iv) 1934, Nathan III, 1680, latest editions] and this case was tried under Common Law. Rantsoane's case cannot be applied to a common law suit. Common law provides that a seducer is legally bound to maintain, or to contribute to the maintenance of his illegitimate children, whether or not the mother is able to support them wholly by her own efforts. The mother's father only comes into the picture if neither parent of the illegitimate child is able to provide for it.

It is true that the Defendant has paid the Plaintiff's father damages under Native Custom but such damages are designed to compensate the father for the depreciation in marriage value to his daughter. No maintenance is payable under Native Law in these circumstances so the Plaintiff's only remedy is under Common Law.

Counsel for Appellant conceded that he is not entitled to claim arrear maintenance.

The appeal is allowed with costs and the case is returned to the Court below to take evidence of Defendant's and Plaintiff's financial circumstances and to make an award of maintenance in accordance with the Common Law.

For the guidance of the Court, it may be mentioned that this Court, in the case of an ordinary Native, with no special education or status, considers £1 to £1. 5s. a month reasonable for small children and £2 a month for older children, and that maintenance should cease, in the case of able bodied children, when they reach the age of 16 years or obtain employment whichever is the sooner.

King and Potgieter, Members, concurred.

For Appellant. Advocate L. L. Esselen.

For Respondent: Advocate A. T. Spoelstra.

NORTH-EASTERN NATIVE APPEAL COURT.

MANYUROLA AND MANYUROLA *v.* GILLETT N.O.

N.A.C. CASE No. 66 OF 1960.

PRETORIA: 5th October, 1960. Before Ramsay, President; King and Potgieter, Members of the Court.

JURISDICTION AND PROCEDURE.

European attorney appointed as administrator of Native estate—capacity to sue or be sued in Court of Native Commissioner.

Summary: Gillett, a European attorney, appointed in terms of Section 4 (1) of Government Notice No. 1664 of 1929 sued in a Native Commissioner's Court in his capacity as representative of the estate. Case was commenced in Magistrate's Court where all pleadings were taken and then, by consent, removed to Native Commissioner's Court.

Held: That there is no provision in the Rules for Native Commissioners' Courts for the removal thereto of a case commenced in a Magistrate's Court.

Held: That a non-native cannot sue or be sued in a Native Commissioner's Court.

Cases referred to:

Louis Sachs, N.O., and Maria Malope *v.* John Mdhluli, 1956. N.A.C. 43.

Gumede *v.* Bandhla Vukani Bakithi, Ltd., 1950 (4) S.A. 560.

Haarhof's Executor *v.* de Wet's Exccutor, 1939 C.P.D. 271.
Khoapa *v.* Scymour, N.A.C. (N.E.), Vol. III, page 130.
Klaas *v.* Welsh, N.O., and Another, N.A.C., Vol. V, page 183.
Dickinson, N.O., *v.* Makatini, 1938, N.A.C. (N. & T.) 255.
Duma *v.* Swales, N.O., 1952 N.A.C. (N.E.), at 272.
Gudase *v.* Swales, N.O., 1956 N.A.C. (N.E.), at 140.
Behrman, N.O., *v.* Mtombeni, 1947 N.A.C. (N.E.), at 123.

Authorities referred to:

Sections 10 (1) and 35, Act No. 38 of 1927.
Section 4 (1), Government Notice No. 1664 of 1929.

Appeal from the Court of Native Commissioner, Pretoria.

Ramsay (President):

J. H. Gillett, in his capacity as executor testamentary of the estate of the late Bella Komane, issued summons in the Court of the Magistrate of Pretoria against Defendants for repayment of the sum of £200 lent by Bella Komane to the Defendants.

Further particulars were requested and furnished and a plea was filed. On the 6th May, 1960, Plaintiff's attorneys served a document "Notice of Removal" which reads "Be pleased to take notice that with the consent of all the parties hereto, this action is hereby removed to the Native Commissioner's Court for hearing on the 1st May, 1960, for the convenience of all parties". Thereafter the proceedings continued in the Court of the Native Commissioner, Pretoria.

This procedure has two fatal flaws. There is no provision in the rules for Native Commissioners' Courts for removal of a case from a Court other than a Native Commissioner's Court to a Native Commissioner's Court, and no provision for any procedure other than that prescribed by the rules.

Furthermore, the case, correctly commenced in the Magistrate's Court, should have been pursued to finality there. In the case of *Louis Sachs, N.O., and Maria Malope* v. *John Mdhluli,* 1956 N.A.C., 43, which this Court affirms, it was pointed out that according to Section 10 (1) of Act No. 38 of 1927, the Minister may . . . . constitute Courts for the hearing of all civil cases and matters between Native and Native only. Section 35 defines "Native" as a member of any aboriginal race or tribe in Africa. In *Gumede* v. *Bandhla Vukani Bakithi, Ltd.,* 1950 (4) S.A. 560, it was held that the main test to be applied in determining whether a person was a Native or not was one of race and that a limited liability company could not be susceptible to such a test. Neither Mr. Gillett nor the estate late Bella Komane is a Native as Mr. Gillett, a European, and a deceased estate is not a legal *persona* which can sue or be sued (*Haarhof's Executor* v. *de Wet's Executor,* 1939 C.P.D. 271).

Advocate Ackermann for Appellant at once conceded that the Court of Native Commissioner and this Court had no jurisdiction and that his client's appeal must fail on the grounds stated.

This Court most reluctantly affirms the judgment of the Central Appeal Court, as it is felt that it was not the intention of the legislature to restrict the meaning of the word "Native" in section 35 of the Native Administration Act, so as to exclude bodies or matters which are purely Native from Native Commissioners' Courts, but it considers itself bound by the decision in *Gumede* v. *Bandhla Vukani Bakithi, Ltd.,* 1950 (4) S.A. 560. The contrary decisions of this Court have not been lost sight of, but they cannot prevail against the Supreme Court decision.

The appeal is allowed and the Native Commissioner's judgment is altered to "Claim dismissed". No order as to costs is made in either Court.

King and Potgieter, Members, concur.

For Appellant: Advocate L. W. H. Ackermann.

Respondent in default.

NORTH-EASTERN NATIVE APPEAL COURT.

DUBE *v.* **MNISI.**

N.A.C. CASE No. 3 OF 1960.

PRETORIA: 5th October, 1960. Before Ramsay, President; King and Potgieter, Members of the Court.

NATIVE CUSTOM.

Substitute wife.

Summary: A man entered into a customary union with a woman, who died in childbirth; her father provided her sister as a substitute; the new wife deserted and her husband sued for return of lobola and custody of the child.

Held: That it is lawful and customary for the father of a deceased wife to replace her with another daughter.

Authorities referred to:

Seymour, page 93.

Whitfield, page 195.

Ramsay, paragraph 24.

Stafford and Franklin, page 181.

Nkwanyana *v.* Nkwanyana, 1958, N.A.C. 4.

Appeal from the Court of Native Commissioner, Piet Retief.

Only excerpts from the judgment are given.

Ramsay, (President):

Plaintiff's claim is to the following effect:—

> Plaintiff married Defendant's daughter by Native custom and the daughter died in childbirth. Defendant provided a substitute, being another daughter. This substitute deserted Plaintiff who now sues for her return or the return of his *lobola* and custody of her minor child.

Defendant pleaded that the second union is *contra bonos mores* and cannot be enforced, that the child was not fathered by Plaintiff so does not belong to him and that as Plaintiff's wife (meaning the partner of the first union) died in childbirth, the lobola paid for her is not all returnable.

The Native Commissioner gave judgment as follows:—

> "Judgment for Plaintiff with costs. The Defendant's daughter Toti, is hereby ordered to return to the kraal of Plaintiff within a reasonable time, failing which Defendant is ordered to return 9 beasts or their value £45 to the Plaintiff."

Defendant now appeals on the grounds that the judgment is against the weight of evidence and the balance of probabilities, that the second union was immoral and *contra bonos mores* and that as the first wife died in childbirth, Plaintiff cannot claim return of his full *lobola.* Also that as the child claimed is illegitimate and not the child of Plaintiff, custody cannot be given to the Plaintiff.

Firstly, to deal with the argument that the provision of a substitute wife is immoral and *contra bonos mores*, this Court can find no support for such a viewpoint. As the Native Commissioner in his reasons for judgment states "The law of the land allows a man to marry his deceased wife's sister. Moreover, Seymour (page 93) and Whitfield (page 175) quote authorities where such arrangement of replacing a deceased wife who died shortly after marriage by her younger sister is Native Law, among both the Nguni and Sotho". The reference to Whitfield (2nd Edition) should be page 155. I will add to these authorities by referring to Paragraph 24 *et seq* of Ramsay's "Thonga Law in the Transvaal" which gives details of the custom, and to Page 181 of Stafford and Franklin's "Native Law".

King and Potgieter, Members concurred.

For Appellant: Mr. R. D. Kneen (Her. Olmesdahl).

For Respondent: Mr. C. Petty (Olmesdahl and Olmesdahl).

SOUTHERN NATIVE APPEAL COURT.

MARTIN *v.* KOTI AND OTHERS.

N.A.C. CASE No. 43 OF 1960.

KINGWILLIAMSTOWN: 25th October, 1960. Before Balk, President, Yates and Leppan, Members of the Court.

PRACTICE AND PROCEDURE.

Sale in Execution—Validity of attachment and sale under warrant of execution issued by Native Commissioner's Court of interest in site in Municipal Native Location. Notice of actual sale must be published in newspaper in addition to placing such notice on notice board.

Summary: Notice that the judgment debtor's interest in a hut-site was to be sold in execution on 21st May, 1960, was duly published in a newspaper and a similar notice was affixed to the notice board at the Native Commissioner's Court. On the 21st May, 1960 the sale was postponed to the 28th May, 1960, at the instance of the judgment debtor who undertook in writing to pay the whole amount due by the 27th May, 1960, and agreed that the attachment of the interest was to continue and that if he did no pay the amount due by that date the Messenger could sell the interest. The judgment debtor failed to effect payment by the date stipulated. On the 28th May there were no purchasers. The interest was sold on the 4th June, 1960. A notice of this sale was affixed to the notice board at the Native Commissioner's Court but such notice was not published in a newspaper.

The appeal was brought on the grounds *inter alia* that—

(*a*) the Appellant's right, title and interest in and to improvements on the hut-site is not capable of being attached or sold in execution under process issuing in the Native Commissioner's Court, under any of the provisions of the Native Administration Act, No. 38 of 1927, as amended, or any of the regulations framed thereunder; and

(*b*) . . . that it was a peremptory legal requirement that the Messenger of the Native Commissioner's Court publish notice of the fresh date of sale in some local or other newspaper circulating in the area of East London of the fresh date appointed by him for the sale, and as he had not done so, any sale on the 4th June, 1960, is vitiated and null and void.

Held: The attachment and sale under the warrant of execution issued by the Native Commissioner's Court of the interest in the site was competent.

Held further: That notice of the actual sale on the 4th June, 1960, should have been published in a newspaper in addition to having been placed on the notice board.

Cases Referred to:

Kruger *vs.* Monala, 1953 (3) S.A. 266 (T.P.D.).

Nkwana *vs.* Hirsch, 1956 (4) S.A. 450 (A.D.), pages 457 and 458.

Poffley *vs.* Goldblatt, 1933, T.P.D. 222.

Connolly *vs.* Ferguson, 1909, T.S. 195.

Hogan *vs.* Messenger, Johannesburg, 1915, W.L.D. 101.

Perumal *vs.* Messenger of the Court and Others, 1953 (2) S.A. 734 (N.P.D.), pages 736 and 738.

Messenger of the Magistrate's Court, Durban *vs.* Pillay, 1952 (3) S.A. 678 (A.D.).

Statutes, etc. referred to:

Rules 60 (1), 60 (5), 67 (9), 69 (6) and 96 (1) of the Rules for Native Commissioners' Courts.

Appeal from the judgment of the Acting Additional Native Commissioner at East London.

Balk (President):

This is an appeal from the judgment of a Native Commissioner's Court refusing, with costs, an application by the judgment debtor (present Appellant) for an order setting aside the sale in execution of his interest in a certain trading site, including improvements thereon, in a Municipal Native Location in East London. A rule *nisi* interdicting the Messenger of the Native Commissioner's Court from transferring the interest to the purchaser in pursuance of the sale in execution was also sought in the application.

The judgment creditor, the Messenger of the Native Commissioner's Court and the purchaser of the interest at the sale in execution are the Respondents.

The undisputed facts are as follows:—

The judgment debtor's interest in the site was attached by the Messenger of the Native Commissioner's Court on the authority of a warrant of execution issued by that Court against his property in pursuance of its judgement in a civil action. Notice that the interest was to be sold in execution on the 21st May, 1960, was published in a newspaper on the 10th *idem.* A similar notice was affixed to the notice board at the Native Commissioner's Court. On the 21st *idem* the sale was postponed to the 28th *idem* at the instance of the judgment debtor who undertook in writing to pay the whole amount due under the judgment by the 27th *idem* and agreed that the attachment of the interest was to continue and that if he did not pay the amount due by the 27th *idem,* the Messenger of the Court could sell the interest or if he was unable or unwilling to do so, it could be sold at his (the judgement debtor's) expense by public auction by a certain firm of auctioneers. The judgment debtor also indemnified the Messenger of the Court against any claim that might be made. He failed to effect the payment by the date stipulated. On the 28th *idem* there were no purchasers. The interest was sold on the 4th June, 1960. A notice of this sale was was affixed to the notice board at the Native Commissioner's Court but such notice was not published in a newspaper.

The first three grounds of appeal read as follows:—

"1. That Appellant's right, title and interest in and to improvements on Hut-site 4 Jabavu Street, Sipunzana (Duncan Village Extension), East London, is not capable of being attached or sold in execution under process issuing in the Native Commissioner's Court, under any of the provisions of the Native Administration Act No. 38 of 1927, as amended, or any of the regulations framed thereunder, and particularly Regulations 60, 67, 68 and 69, and therefore the attachment and sale in execution of the said improvements was invalid.

2. That—

(*a*) no authority was given to the Messenger of the Native Commissioner's Court in the Writ of Attachment issued on 7th May, 1960, to attach such right, title and interest in and to the said improvements, or as he terms it "Defendant's rights, title, interest in and improvements to Hut-site 4 Jabavu Street," or sell the same in execution.

(*b*) nor even if he was given such authority in the said Writ was is competent and legal under the said Act or Regulations for him to do so.

Any attachment and sale in execution was therefore in either case invalid.

3. That if the Appellant's interest in the said improvements is to be regarded as a quasi movable, or a moveable (which is not admitted) is was a peremptory legal requirement that the Messenger of the Native Commissioner's Court publish Notice of the fresh date of sale (4th June, 1960) in some local or other newspaper circulating in the area of East London of the fresh date appointed by him for the sale, and as he has not done so, any sale on the 4th June, 1960, is vitiated and nul and void."

It is unneccessary to quote the remaining grounds because they do not call for consideration as will be apparent from what is stated later in this judgment.

As pointed out by Mr. Cohen in his argument for the Respondent, the validity of the sale was attacked by the judgment debtor's attorney in the Native Commissioner's Court on two grounds only, viz., (1) that as the interest attached was an immovable, the sale should have been advertised in accordance with the requirements of Rule 69 (6) of the Rules for Native Commissioners' Courts which was not done; and (2) that if the interest was a moveable, the sale on the 4th June, 1960, should have been advertised in the newspaper as required by Rule 67 (9) of those Rules which was also not done. The Judgment debtor's attorney admitted during the course of the hearing of the application in the Native Commissioner's Court that if the property attached was a moveable, the sale was in order except for the advertisement.

It seems to me that it is incumbent on this Court to deal with the point of law forming the basis of the first and second grounds of appeal even though this point was not taken in the Native Commissioner's Court as its consideration by this Court does not appear to involve unfairness to the Respondents in that the facts on which it depends are common cause, viz., the sale in execution of the judgment debtor's interest in the site attached by the Messenger of the Native Commissioner's Court on the authority of the warrant of execution issued by that Court against the judgment debtor's property in pursuance of its judgment in the civil action, see *Cole* vs. *Government of the Union of S.A.*, 1910, A.D. 263, at pages 272 and 273.

In support of his contention that the attachment and sale in execution of the judgment debtor's interest in the site were invalid, Mr. Kaplan on behalf of the Appellant cited *Kruger* vs. *Monala,* 1953 (3) S.A. 266 (T.P.D.) and other decisions of the Supreme Court to the same effect.

That the judgment debtor's interest is a personal right and thus an incorporeal is clear from the judgment in *Nkwana* vs. *Hirsch,* 1956 (4) S.A. 450 (A.D.), at pages 457 and 458, bearing in mind that the statutory provisions governing that interest here are substantially the same as those obtaining there, see sections 2, 3, 22 and 23 of Chapter 4 of the East London Municipal Native Location Regulations published under Provincial Notice No. 260 of 1957.

Although the interest here is an incorporeal right, its attachment under the authority of the warrant of execution issued by the Native Commissioner's Court against the judgment debtor's property and the subsequent sale in execution were, in my view, competent in terms of Rule 60 (1) of the Rules for Native Commissioners' Courts regard being had to the definition of "property" in Rule 96 (1) of those Rules which specifically includes incorporeals both moveable and immovable. The position was different with regard to the Magistrates' Courts Act, 1917, as there was no definition of "property" pertaining to the provisions of the Act itself and it was held that an incorporeal movable was not moveable property within the meaning of section 55 of the Act, see *Poffley* vs. *Goldblatt,* 1933, T.P.D. 222. This was also the position with similar prior legislation, see *Connolly* vs. *Ferguson,* 1909, T.S. 195 and *Hogan* vs. *Messenger, Johannesburg,* 1915, W.L.D. 101 cited in *Poffley's* case. The fact that Rule 60 (5) of the above-mentioned Rules sets out certain incorporeal movables which may also be attached, does not, to my mind, limit execution to those incorporeals, regard being had to the language of this Rule and that of the said Rule 60 (1) read with the definition of "property" referred to above. Consequently, the position in *Kruger's* case (*supra*) that an interest of the nature here in question is not capable of being attached and sold in execution under process of the Magistrate's Court being, as it is, based on an interpretation of section 68 (3) of the Magistrates' Courts Act, 1944, to which the said Rule 60 (5) corresponds, and on *Poffley's* case, has no application here. The first and second grounds of appeal, therefore, fail.

Turning to the third ground of appeal, the interest here falls to be regarded not as an immovable, as submitted by Mr. Kaplan, but as a moveable, see *Perumal* vs. *Messenger of the Court and Others,* 1953, (2) S.A. 734 (N.P.D.), at pages 736 and 738. It follows that the procedure as regards the advertisement prescribed by Rule 67 (9) referred to above ought to have been complied with here. This rule requires the Messenger of the Court to advertise the sale also in a newspaper and, in my judgment, this requirement obtains in respect of the actual sale even though there may have been a postponement thereof of the nature here in question; for, were it otherwise it would defeat the very object of the requirement as the sale would not then be given the wider publicity ensured by its advertisement in a newspaper. Possibly, the position may be different where intending purchasers attending a sale which had been properly advertised, are then notified that it has been postponed to a specific date. As conceded by Mr. Cohen, there is nothing to indicate that such notice was given to intending purchasers who may have appeared on the 21st May, 1960, and in any event such notice could not have been given on the 28th *idem* as no purchasers appeared on that date. It is true that the postponement of the sale was at the judgment debtor's instance but this does not affect the position because he did not waive advertisement

of sale in a newspaper as it is clear from his written undertaking embodying the conditions of the postponement of the sale; nor is there anything in that undertaking estopping him from attacking the validity of the sale owing to its not having been advertised in a newspaper This disposes of Mr. Cohen's argument on this aspect.

The requirements of the said Rule 67 (9) in regard to advertisement of a sale are imperative and failure to observe them invalidates the sale, as was submitted by Mr. Kaplan, see *Messenger of the Magistrate's Court, Durban* vs. *Pillay*, 1952 (3) S.A. 678 (A.D.), cited by him.

That being so and as notice of the sale on the 4th June, 1960, was not published in a newspaper, the appeal succeeds on the third ground and it becomes unneccessary to consider the remaining grounds.

It seems to me that there is no necessity for the interdicts sought as the setting aside of the sale precludes the Messenger of the Court from proceeding with the transfer of the interest to the Purchaser.

In the result the appeal should be allowed, with costs, and the judgment of the Native Commissioner's Court altered to read "It is ordered that the sale in execution on the 4th June, 1960, of the judgment debtor's interest in the site at 4 Jabavu Street, Duncan Village Extension, East London, including the improvements on this site, be and it is hereby set aside, with costs."

Yates and Leppan, Members concurred.

For Appellant: Mr. T. H. Kaplan of East London.

For Respondent: Mr. H. Cohen of East London.

SOUTHERN NATIVE APPEAL COURT.

NDONGA AND LUMKO *v.* MAPOMA.

N.A.C. CASE No. 42 OF 1960.

KING WILLIAM'S TOWN: 28th October, 1960. Before Balk, President, Yates and Leppan, Members of the Court.

PRACTICE AND PROCEDURE.

Non-Joinder of persons having direct and substantial interest in outcome of application—Native Commissioner's Court having no jurisdiction in event of their joinder—consent by such persons to be bound by the judgment of the Court notwithstanding that they were not cited as parties affords no remedy Jurisdiction of Native Commissioner's Court where Messenger of Court cited as party.

Summary: Applicant (now Appellant) applied to a Native Commissioner's Court for an order setting aside a sale in execution of his interest in a stand in a municipal location attached by the Messenger of the Court in pursuance of a judgment thereof, as also an order directing the Town Clerk and the Manager of the Non-European Affairs Department of the municipality to re-register the stand in the Applicant's name.

It is common cause that the Judgment Debtor's interest in the stand was sold in execution to one Adams and it is not disputed that the latter sold this interest to one Maquke. It is also not disputed that the Judgment Debtor's interest in the site was transferred by the Superintendent of the Location first to Adams and then from the latter to Maquke on the same day. From the evidence it was clear that Adams is a non-Native. The Judgment Creditor and the Messenger of the Native Commissioner's Court were the only persons cited as Respondents in the application.

The appeal was brought against the judgment of the Native Commissioner's Court dismissing the application with costs, on grounds attacking this judgment on the merits but not touching upon the question whether persons other than the two Respondents should have been cited as parties in the application.

During argument the attorney for the Appellant raised the point as to whether the failure to cite the Superintendent, Adams and Maquke as parties to the application, could not be remedied by ascertaining whether these persons would be prepared to be bound by the decision of the Court notwithstanding the fact that they were not cited as parties in the application.

Held: That the Superintendent of the Queenstown location should have been cited as a Respondent in that he had a direct and substantial interest in the action, as the order sought involved the re-transfer to the Judgment Debtor of the site permit which is subject to the Superintendent's prior approval and bearing in mind that any such order would not be binding on the Superintendent as *res judicata* as he was not a party to the proceedings. Adams and Maquke as Purchasers of the Judgment Debtor's interest in the stand obviously have a similar interest.

Held further: That had the Location Superintendent, Maquke and Adams been cited the Native Commissioner's Court would not have had jurisdiction to hear the case, in that the Location Superintendent in his official capacity cannot be regarded as a Native and Adams is a non-Native.

Held further: That a consent by the Location Superintendent, Adams and Maquke to be bound by the decision of the Court, notwithstanding the fact that they had not been cited as parties in the application, would have the effect of conferring on the Native Commissioner's Court by consent a jurisdiction it does not have which is not permissible and consequently any such undertaking would be valueless.

Held further: The Native Commissioner's Court has jurisdiction in so far as the Messenger of the Court is concerned as it appears to be implicit in the jurisdiction conferred on such Courts by Section 10 of the Native Administration Act, 1927, that cases in which officers of such Courts are cited as parties in matters dealt with by them in their official capacities are included.

Cases referred to:

Amalgamated Engineering Union *vs.* Minister of Labour, 1949 (3) S.A. 637 (A.D.).

Nthaka *vs.* Nthaka, 1959 N.A.C. 79 (C).

Tshandu *vs.* Swan and Another, 1946 A.D. 10.

Herbstein's and Van Winsen's Civil Practice of the Superior Courts in S.A., page 13.

Gumede *vs.* Bandhla Vukani Bakithi, Ltd., 1950 (4) S.A. 560 (N.P.D.).

Purchase *vs.* Purchase, 1960 (3) S.A. 383 (D.C.L.D.).

Balk (President):

This is an appeal from the judgment of a Native Commissioner's Court dismissing, with costs, an application by the Judgment Debtor for an order setting aside a sale in execution of his interest in Stand No. 780, in the Municipal Location at Queenstown, attached by the Messenger of the Court in pursuance of a judgment thereof. An order directing the Town Clerk and the Manager of the Non-European Affairs Department of the Queenstown Municipality to re-register the stand in the Applicant's name was also sought in the application.

The Judgment Creditor and the Messenger of the Native Commissioner's Court are the only persons cited as Respondents in the application.

The appeal is brought by the Judgment Debtor on grounds attacking the judgment on the merits but not touching upon the question whether persons other than the two Respondents should have been cited as parties in the application.

It is common cause that the Judgment Debtor's interest in the stand was sold in execution to one Adams and it is not disputed that the latter sold this interest to one Maquke. It is also not disputed that the Judgement Debtor's interest in the site was transferred by the Superintendent of the Location first to Adams and then from the latter to Maquke on the same day.

It was conceded on behalf of the parties in this Court that the Queenstown Municipality is the owner of the land comprising the location, including the stand in question, that the rights of occupation to the stand are governed by the Regulations published under Provincial Notice No. 563 of the 5th September, 1958 (hereinafter referred to as "the Regulations") and that the site permit held by the Judgment Debtor in respect of the stand was transferred by the Superintendent of the Location first to Adams and then to Maquke.

In these circumstances and regard being had to the judgment in *Amalgamated Engineering Union* vs. *Minister of Labour,* 1949 (3) S.A. 637 (A.D.), this Court *mero motu* raised the question whether the Superintendent, Adams and Maquke should not also have been cited as parties in the application and, if this had been done, whether the Native Commissioner's Court would have had jurisdiction. Argument was heard on these aspects.

It is manifest from sections 5 (7) and 10 (1) of Chapter 3 of the Regulations that a site permit entitles the holder thereof, subject to certain qualifications which are not in question here, to the exclusive use and occupation of the site and that no site permit may be transferred without the prior permission of the Superintendent. Mr. Kelly, in his argument on behalf of the Appellant, submitted that the Superintendent did not have "a direct and substantial interest" as envisaged in the *Amalgamated Engineering Union's* case in the order sought in the application in so far as the re-registration of the stand in the Judgment Debtor's name was concerned as the Superintendent had no interest in the matter provided the proposed transferee was entitled to be in the Location. But, as properly conceded by Mr. Place on behalf of the Respondent, the Superintendent has such an interest as the order sought involves the re-transfer to the Judgment Debtor of the site permit held by Maquke which, in terms of Section 10 (1) of Chapter 3 of the Regulations, is subject to the Superintendent's prior approval, and bearing in mind that any such order would not be binding on the Superintendent as *res judicata* as he is not a party to the proceedings. It is obvious that both Adams and Maquke as purchasers of the Judgment Debtor's interest in the stand and as subsequent transferees of the relative site permit also have an interest of the nature here in question in the order sought.

Consequently, in accordance with the principles enunciated in the *Amalgamated Engineering Union's* case, the Superintendent, Adams and Maquke should also have been cited as parties in the application and the failure to do so precluded its effective trial on the merits. A similar view was taken in *Nthaka* vs. *Nthaka,* 1959 N.A.C. 79 (C).

It is true that Adams and the Superintendent were aware of the application as they gave evidence at the hearing thereof but, as laid down in the *Amalgamated Engineering Union's* case, mere non-intervention by an interested person who has knowledge of the proceedings does not remedy a failure to cite him as a party therein.

It should be added that it was not necessary to cite the Town Clerk or the Manager of the Non-European Affairs Department as Respondents as they had no real interest in the issue in that the transfer of the rights to the stand is, in terms of section 10 (1) of Chapter 3 of the Regulations, a matter affecting the Superintendent only, see *Tshandu* vs. *Swan and Another,* 1946, A.D. 10.

Mr. Kelly submitted that this Court should follow here the course taken in the *Amalgamated Engineering Union's* case, as set out in the concluding paragraph of that judgment, i.e., ascertain whether the Superintendent, Adams and Maquke are prepared to be bound by the decision of this Court, nothwithstanding the fact that they were not cited as parties in the application. But, as properly conceded by Mr. Place, such a course would have the effect of conferring on the Native Commissioner's Court by consent a jurisdiction it does not have which is not permissible, see *Herbstein's and Van Winsen's Civil Practice of the Superior Courts in S.A.* at page 13, and the authorities there cited and consequently any undertaking by the Superintendent or Adams to be bound by the judgment of this Court would be valueless. That this would be the effect is apparent from the fact that in terms of Section 10 (1) of the Native Administration Act, 1927, the jurisdiction of Native Commissioner's Courts is limited to suits between Natives and Adams is, according to the evidence, a non-Native. The Superintendent in his capacity as such also does not appear to fall within the definition of "Native" in Section 35 of that Act, as amended, bearing in mind that the criterion there is the race of the person concerned and that a person cited in his official capacity could hardly be said to be susceptible to such a test, see *Gumede* vs. *Bandhla Vukani Bakithi, Ltd.,* 1950 (4) S.A. 560 (N.P.D.). To my mind, the Native Commissioner's Court has jurisdiction in so far as the Messenger of that Court is concerned as it appears to be implicit in the jurisdiction conferred on such Courts by Section 10 of the said Act that cases in which officers of such Courts are cited as parties in matters dealt with by them in their official capacities, as is the position here, are included.

In the circumstances it seems to me that the proper course for this Court to adopt is to allow the appeal and to alter the judgment of the Native Commissioner's Court to one making no order on the application. Here it should be mentioned that the dismissal of the application by the Native Commissioner's Court is equivalent to its refusal, see *Purchase* vs. *Purchase,* 1960 (3) S.A. 383 (D.C.L.D.), and for the reasons given above the application should not have been disposed of by that Court on the merits.

As the appeal turns on a point not taken by the parties in the Native Commissioner's Court or in this Court but raised by this Court *mero motu,* there should be no order as to costs in either of these Courts, see *Yeni* vs. *Jaca,* 1953, N.A.C. 31 (N.E.), at page 34, and *Nthaka's* case (*supra.*), at page 81.

In the result the appeal should be allowed with no order as to costs and the judgment of the Native Commissioner's Court altered to read "No order made on the application including no order as to costs".

Yates and Leppan, Members, concurred.

For Appellant: Mr. H. J. C. Kelly of Lady Frere.

For First Respondent: In default.

For Second Respondent: Mr. J. Place of King William's Town.

countersigned by C. Nel, Justice of Peace/Vrederegter. Then follow sworn statements signed by John Robert Msimela and Wilfred Majola and countersigned by C. Nel. The declaration of John Robert Mzimela is dated 23rd November, 1956. It is quite evident that Harold Mzimela did not attend the original "Inquiry" and that his statement was made the day after the Native Commissioner had declared who the heir was.

Section 3 (2) of Government Notice No. 1664 of 1929 makes provision for an inquiry to be held where a Native Commissioner considers it necessary to *determine the person or persons entitled to such property.* It provides for such Native Commissioner to call before him . . . and . . . .

Section 3 (3) states that where any dispute or question has arisen concerning the administration or distribution of any such property as is referred to in sub-section (2), such Native Commissioner shall summon before him all the parties concerned and such witnesses as he may consider necessary.

An inquiry envisaged by section 3 (2) has as its aim the determination, if the Native Commissioner considers it necessary in connection with the distribution of any property, of the person or persons entitled to such property, whereas the inquiry under section 3 (3) is necessary where any dispute or question has arisen concerning the administration or distribution of any such property, etc. In the latter eventuality, the language of the sub-section is peremptory in that the Native Commissioner shall summon before him all the parties concerned and such witnesses as he may consider necessary. In my view a determination under section 3 (2) cannot and does not preclude an inquiry under section 3 (3) especially if one of the claimants was not a party to the proceedings under section 3 (2) as is the position in the instant case.

In paragraph 7 of his reasons for judgment the Native Commissioner states as follows: "I held that once there was an enquiry as a result of a dispute of the nature set out in section 3 (3) of Government Notice No. 1664 and an heir has been appointed, I have no jurisdiction to re-open the enquiry . . . ." This reasoning is correct because a determination under that sub-section is *res judicata* between the parties as was stated by Menge (Permanent Member as he was then) in *Malaka* v. *Malaka,* 1954, N.A.C. at page 234. Note the use of the words "a determination under that sub-section".

Now in the instant case the determination was made under section 3 (2) and in the absence of Harold Mzimela. There was apparently no dispute at the time. A dispute has arisen and an enquiry under section 3 (3) now becomes necessary.

The appeal is therefore allowed and it is ordered that an inquiry under section 3 (3) of Government Notice No. 1664 of 1929 be held by the Native Commissioner, Camperdown, to determine who the heir is in the estate of the late Mdephu Philemon Mzimela. The costs of the appeal will be borne by the estate.

Ramsay, President, and King, Permanent Member, concurred.

For Appellant: Advocate A. S. K. Pitman.

Respondent in default.

person claimed to be heir and another inquiry was ordered, in terms of Section 3 (3) of the regulations. Judicial Officer held he had no authority to re-open the matter.

Held: That a determination in terms of Section 3 (2) of Government Notice No. 1664 of 1929, does not preclude a further inquiry being held in terms of Section 3 (3) where a dispute arises.

Appeal from the Court of Native Commissioner, Camperdown.

Botha (Member):

On the 9th August, 1960, certain people including Harold Mzimela, Applicant in this matter, and John Robert Mzimela, Respondent, appeared before the Native Commissioner, Camperdown, ostensibly for an inquiry under Government Notice No. 1664 of 1929. After recording some evidence, the Native Commissioner found he had no jurisdiction to review the finding of the Native Commissioner made on 23rd November, 1956, and that the appropriate remedy lies to the Native Appeal Court and that it would appear from his investigations that the heir was properly and correctly appointed. In the finding to which reference is made, John Robert Mzimela was appointed heir and the proceedings of the 9th August, 1960, follow on Harold Mzimela's dissatisfaction with the finding.

The Native Commissioner's finding of the 9th August, 1960, is now attacked on appeal to this Court on the following grounds:—

The learned Native Commissioner misdirected himself in deciding that if he held the inquiry set down for the 9th August, 1960, for the purpose of resolving the dispute in regard to the heir of the above estate, he would be in fact reviewing his predecessor's finding made on the 23rd November, 1956, because—

(*a*) his predecessor summoned all parties concerned to appear before him on the 9th August, 1960, to attend an enquiry in terms of regulation 3 (3) of the regulations framed under the provisions of sub-section (10) of Section 23 of Act No. 38 of 1927, viz. the Native Administration Act;

(*b*) there had been no valid determination of the heir as all parties concerned had not been summoned by his predecessor;

(*c*) even if his predecessor had appointed the heir, if a dispute subsequently arose, his predecessor acted correctly in calling an inquiry under regulation 3 (3) mentioned above;

(*d*) there has been no inquiry held to resolve the dispute in regard to the appointment of the heir."

Now on the 26th November, 1956, the Native Commissioner, Camperdown, made the following determination:—

> "It is hereby declared that Mike Mzimela is the heir to the estate of Mdepu Mzimela and John Robert Mzimela is the heir to the estate of the late Mike Mzimela according to Native Law and Custom, and Mr. Paul John Leonard Randles is appointed as representative to these estates."

This follows on what could only be an inquiry under section 3 (2) of Government Notice No. 1664 of 1929—an inquiry to ascertain who was the heir of the late Mdepu Mzimela.

An examination of the papers which constitute the record of this inquiry, reveals that the record dated 23rd November, 1956, relating to a meeting of the next of kin—estate late Mdepu Philemon Mzimela—was signed by one Samson D. Nkehli, who made a sworn statement then and countersigned by C. Nel whose designation is shown as Justice of Peace/Vrederegter Another document, dated 27th November, 1956, is apparently a sworn statement made by one Harold Mzimela, signed by him and

Defendant appealed to this Court on the ground that the judgment is against the evidence and the weight of evidence.

At the hearing of the appeal Counsel for Appellant accepted that a customary union existed between Plaintiff and Defendant but argued—

(1) that although it was clear that the cattle were removed from Plaintiff's kraal there was nothing to indicate that they were in his "possession"; and

(2) that Defendant had been precluded from leading evidence that they were not in his "possession".

It is common cause that the stock was removed from Plaintiff's kraal. He must have been kraalhead and there is a presumption in law that stock at a kraal is the property of the kraalhead (page 80/81 of Stafford and Franklin)—it is also a presumption in such circumstances that the stock is in the "possession" of the kraalhead. However, these arguments do not in any wise affect the matter as the following excerpt from the judgment in the case of *Nozinja Masuku* v. *Mhlanganyelem Kunene,* 1940, N.A.C. (T. & N.) 79, is applicable:—

> "In the present case the Appellant is a married woman, and a perpetual minor. Her husband is her guardian, in terms of section 44 (3) of the Code, and all property she may have acquired is held by her for the benefit of her house . . . .
>
> If the woman has quarelled with her husband it is purely an administrative matter which should be dealt with by her chief in consultation, if necessary, with the Native Commissioner."

In the circumstances the appeal is allowed and the order on Appellant to return the stock is set aside.

There will be no order as to costs.

As between husband and wife the matter should be dealt with as indicated above. If the stock is in the possession of some other person the Plaintiff may, obviously, take action against that person for its return.

In numerous cases a woman sues or is sued "duly assisted . . . ." without disclosing in the summons the capacity in which she is assisted and Native Commissioners are requested, in future, to insist upon the summons disclosing the capacity in which she is assisted, e.g. "duly assisted by her husband A-B, duly assisted by her father and natural guardian C-D", etc.

Ramsay, President and Botha, Member: concur.

For Appellant: Advocate A. S. K. Pitman.

For Respondent: Advocate J. A. Van Heerden.

NORTH-EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 87 OF 1960.

MZIMELA AND OTHERS *v.* MZIMELA.

PIETERMARITZBUG: 24th November, 1960. Before Ramsay, President; King and Botha, Members of the Court.

NATIVE ESTATE.

Inquiries under sub-sections (2) *and* (3) *of Section* 3 *of Government Notice No.* 1664 *of* 1929—Res judicata.

Summary: A Native Commissioner held what purported to be an inquiry under Section 3 (2) of Goveriment Notice No. 1664 of 1929 and indicated the heir. Subsequently another

This Court feels that the Respondent should never have brought this action. His family had paid cattle as lobola some 20 years ago, had had the benefit of the services and association of a wife for all those years and now, on a technicality, endeavoured to recover the cattle so paid. There was, of course, nothing that the other side could recover from him in return for the services of the woman. This Court sees no reason to excuse him from paying the costs incurred.

Cost are accordingly awarded to the Appellant.

King and Botha concurred.

For Appellant: Advocate J. A. van Heerden.

For Respondent: Advocate A. S. K. Pitman.

NORTH-EASTERN NATIVE APPEAL COURT.

NTOMBELA d/a by MKAMELA *v.* **NTOMBELA.**

N.A.C. CASE No. 86 OF 1960.

PIETERMARITZBURG: 24th November, 1960. Before Ramsay, President; King and Botha, Members of the Court.

NATIVE CUSTOM.

Native husband suing deserted wife for spoliation.

Held: A Native woman is a perpetual minor under Section 44 (3) of the Natal Code of Native Law, and under the guardianship of her husband. All property she may have acquired accrues to her house.

Cases referred to:

Nozinja Masuku *v.* Mhlanganyeleni Kumene, 1940 N.A.C. (T. & N.), 79.

Appeal from the Court of Native Commissioner, Babanango.

King (Member):

In this case Gojana Ntombela sued "Flora Ntombela, duly assisted by Mtalagu Jeyi Mkhabela" for six head of cattle, which he alleged, she had removed from his kraal. He further alleged that Flora was his wife by Native Custom and that she had deserted him.

The Defendant in her plea denied that she was Plaintiff's wife but admitted that she had removed the stock from his kraal, alleging paradoxically that they were her rightful property being progeny of a beast which had been given to her as a "wedding" beast.

During the course of the hearing the Native Commissioner made the following finding:—

> "The Court decides the preliminary point in favour of Plaintiff and finds that on the preponderance of probabilities the Plaintiff and Defendant are validly married by customary union.
>
> The case (between man and wife) cannot proceed on the merits and Plaintiff's summons is treated as an application for a spoliation order.
>
> The husband is entitled to possession of the cattle as head of the kraal and it is hereby ordered that the Defendant return the six head to Plaintiff's possession."

In the case of *Mfanombana* v. *Fana,* N.H.C. 1922, page 26, it was laid down that unless the essentials of a customary union were present, the union was null and void and this decision has been followed by this Court on several occasions. This case is distinguished, however, in that there was a person officiating as official witness, whom everybody concerned considered had due authority, whereas in the previous cases there was no official witness at all, in some cases no ceremony, and in some a claim that a customary union existed by virtue of long co-habitation. The Native Commissioner, not being vested with any special powers, was bound by the decisions of the Natal High and this Court, and found that there was no valid customary union.

The Defendant appeals, in regard to this decision, in the following words: "That the union between Genios Mlambo and Veronica Khulu should have been declared valid as the learned Native Commissioner found that the form of marriage ceremony which took place about 1938, followed the form normally performed at a Native customary union celebration, and that Nodongo and Masende Msomi acted as the official witness, although, unknown to the parties, it subsequently transpired that he was at the time not officially appointed as such . . . . that Respondent (Plaintiff) was responsible for securing the attendance of a qualified official witness in his area, that it appeared at the trial twenty years after the ceremony that the official witness called in by Respondent was bogus and unqualified, that Respondent should be precluded from recovering the lobola handed over at the said ceremony, the validity for which the Respondent was himself responsible . . . . that such cattle were disposed of by Appellant's late father with Respondent's full knowledge and without objection."

The provision of law that there should be a public declaration by the bride to an official witness to the effect that she willingly enters into a customary union was obviously designed to prevent forced marriages. In the present case there is ample evidence that the declaration was made, everybody regarded the couple as married, even to the extent that the woman, when a widow, was ngenaed, the lobola recipient disposed of the lobola cattle with the knowledge and acquiescence of the lobola payer, and only now, 22 years afterwards, is the validity of the marriage challenged on a technicality. It appears to this Court that it would be a manifest injustice to permit the Plaintiff to take advantage of this technicality particularly at this late date, and for the Court to hold that a union, entered into by all concerned in all good faith, was an irregular union; thus illegitimising any children of the union.

By virtue of the powers conferred upon it by Section 15 of the Native Administration Act, No. 38 of 1927, this Court declares that the customary union purported to be entered into by Genios Mlambo and Veronica Khulu is valid.

As the Native Commissioner's decision in regard to the validity or otherwise of the customary union dispensed with the necessity of taking evidence on Defendant's counterclaim for five head of cattle, being balance of lobola due, that point still awaits decision.

The appeal is allowed and, on the claim in convention the judgment of the Court below is altered to one for the Defendant with costs. The judgment on the counterclaim is deleted. The case is returned for evidence to be heard on the counterclaim after a plea has been taken and a fresh judgment delivered thereon.

Counsel for Respondent asked that as the Native Commissioner gave the only judgment open to him there should be no order for costs against his client.

The Plaintiff sues the Defendant for 16 head of cattle plus an account and return of their increase, being cattle paid by Plaintiff to Defendant's late father as lobola in respect of a customary union which did not take place. The p'ea is to the effect that a customary union did take place, and that, as the lobola recipient was an induna, the lobola was 16 head, presumably meaning the prescribed 15 head plus a nqutu beast. Of this Defendant alleges 11 head were paid to his father and 5 are still owing, for which he counterclaims. There is no plea to the claim in reconvention.

By consent the Court below was asked first to rule on the point whether there was a valid union or not. He ruled that there was not and the case proceeded on points of fact. Judgment was given for the Plaintiff in convention for the return of 16 head of cattle or their value £80 and the claim in reconvention was dismissed with costs. From the nature of the case, the judgment in reconvention should have been for the Defendant with costs, on the Native Commissioner's findings.

To deal first with the question whether there was a customary union or not, 5 witnesses for the Defendant, who commenced, and 3 for Plaintiff state there was a marriage ceremony attended by an official witness to whom the bride made the essential declaration that she was contracting the union voluntarily, and to whom the parents signified their approval, thus complying with section 59 of the Natal Code. The marriage was not registered.

It is perfectly clear from the evidence that the duly appointed official witness for the area was one Zinqume Butelezi, who had been requested to attend. On the day of the ceremony, however, he was sick and sent Masende Msomi to deputise for him. Everyone present was satisfied that Msomi was an authorised official, witness, and it is even most probable that Zinqume Butelezi thought he was entitled to appoint a deputy in his stead. Strangely, Masende Msomi himself gives evidence and denies being at the ceremony. He cannot be believed in view of the phalanx of witnesses against him: Witnesses whose description of detail in regard to the procedure followed by the "official witness" is entirely inter-corroborative. It is possible that Masende Msomi thinks that if he admitted acting as an official witness without statutory authority he might get into trouble. He was subsequently appointed as an official witness.

The Plaintiff himself states that he was away from home when the ceremony is alleged to have taken place, and he heard there was no ceremony. He states in evidence, regarding his deceased son Genios, and the Defendant's sister Veronica, "I was anxious to see them married. I regarded the cattle (which he paid as lobola and is now claiming) as belonging to Defendant's father. Defendant's father sold some and exchanged others. I never objected. They were happy together and I regarded them as man and wife. I consider she was married to my son Genios. They were married about 25 years," Then Veronica was ngenaed by Genio's brother who also died. Despite this Plaintiff now argues that there was no valid marriage because there was no official witness present, and reclaims the lobola that was paid for Genios.

Anywhere in the Union except Natal, the union as described would unequivocally be legal, but the Natal Code of Native Law prescribes as the essentials of a customary union: Consent of the father or gurdian of the intended wife, consent of the intended husband's father in certain circumstances, a declaration in public by the intended wife to the official witness at the celebration of the union that the union is with her own free will and consent. Section 16 of the Code provides for the appointment of official witnesses by chiefs and their registration with the Native Commissioner.

The matter is struck off the roll but may be again set down for hearing (see *Goldman* v. *Stern,* 1931, T.P.D., 261, and Jones and Buckle, Sixth Edition, page 771), provided notices of hearing in respect of each party are before the Court on the date of trial. The case quoted lays down that the term "struck off the roll" means not dismissal nor absolution but merely suspends the original notice of set down until the Plaintiff puts the matter on the roll again. The Plaintiff is not debarred from re-instating.

King and Botha, Members, concurred.

For Appellant: Advocate A. S. K. Pitman.

For Respondent: Default.

NORTH-EASTERN NATIVE APPEAL COURT.

KHULU *v.* **MLAMBO.**

N.A.C. CASE No. 55 OF 1960.

PIETERMARITZBURG: 23rd November, 1960. Before Ramsay, President; King and Botha, Members of the Court.

NATIVE LAW: MARRIAGES.

Late noting of appeal—negligence by attorney—Sections 16 *and* 59 *of Natal Code of Native Law—official witness to marriage not duly appointed—validity of marriage.*

Summary: Appeal noted late due to fault of attorney not allowed to prejudice client in circumstances disclosed. Validity of marriage celebrated ostensibly in accordance with Section 59 of Code challenged very many years later on ground that official witness at ceremony was not appointed in terms of Section 16.

Held: That the marriage was valid and that a customary union ensued.

Case referred to:

Mfanombana *v.* Fana, 1922 N.H.C., 26.

Authorities referred to:

Section 15, Act No. 38 of 1927.

Appeal from the Court of Native Commissioner, Babanango.

Ramsay (President):

Application is made for condonation of a late noting of appeal due to the Appellant's legal representative failing to stamp his notice of appeal and subsequently providing stamps to the clerk of the Court after the prescribed period. The stamp must be affixed to the notice of appeal when the latter is lodged with the Clerk. (*Mbulawa* v. *Mbulawa,* 1956, N.A.C. 104).

In granting this application, the Court is guided by the dictum in *Rose and Another* v. *Alpha Secretaries, Ltd.,* in the Appellate Division, 1947 (4) S.A. 511: "The Court will consider all the circumstances of the particular case in deciding whether the Applicant has shown something which justifies the Court in holding, in the exercise of its wide judicial discretion, that sufficient cause for granting relief has been shown. This is not a case in which the client should suffer for his attorney's neglect to the extent of being denied access to this Court." It is trusted the Applicant will be involved in no extra cost by reason of his attorney's negligence.

NORTH-EASTERN NATIVE APPEAL COURT.

MNYANDU *v.* KUMALO.

N.A.C. CASE No. 79 OF 1960.

PIETERMARITZBURG: 22nd November, 1960. Before Ramsay, President; King and Botha, Members.

PRACTICE AND PROCEDURE.

Appeal—Respondent cannot be traced—no notice of hearing signed by Respondent—procedure to be followed—meaning of "Struck off the roll".

Held: That when an informal acceptance of notice of hearing of an appeal is not procurable, the notice must be served by a Messenger of Court and his return of service serves in place of the Respondent's signature.

Cases referred to:

Goldman *v.* Stern, 1931, T.P.D., 261.

Authorities referred to:

Government Notice No. 2887 of 1951, Rule 11 (*d*), Jones and Buckle (Sixth Edition), 771, and Government Notice No. 2886, Rule 31.

Appeal from Court of Native Commissioner, Vryheid.

Ramsay (President):

In this matter the Respondent cannot be found and so it has not been possible to obtain his signature on the notice of hearing of appeal (Form N.A. 149), prescribed by Rule 11 (*d*) of the Rules for Native Appeal Courts, as required by the first sentence of Rule 13 (2).

The notice of hearing was sent to the Respondent by registered post but it elicited no response. The Appellant's attorneys thereupon notified the Clerk of Court that they would have the notice served by the Messenger of the Native Commissioner's Court. There is no indication in the record or the correspondence whether this was done and, if so, with what result.

Rule 11 (*d*) provides for informal service of the notice, which means transmission by post or by hand to the party concerned or his attorney. The Rule also provides for service by the Messenger of the Court at the expense of the Appel ant and this course must be followed if informal methods of establishing contact with the Respondent fail. Rule 31 of the Rules for Native Commissioners' Courts prescribe the various ways in which service of process may be effected.

Rule 13 (2) of the Rules for Native Appeal Courts provides that where a notice of hearing has been served by a Messenger of Court, the Messenger's return of service shall be endorsed on the original notice which must then be sent by the Clerk of the Court to the Registrar of the Appeal Court. This then takes the place of the Respondent's signature. The Appeal Court must be in possession of the notices of hearing in respect of each party to an appeal before it can hear the appeal, but there can be no intention in the rules that a Respondent can prevent hearing of an appeal by disappearing and so denying the Appellant recourse to a higher court.

In the present case, as no proof of formal service by a Messenger of Court is produced, the appeal cannot proceed.